No. 14,499

In the United States Court of Appeals for the Ninth Circuit

PAUL E. PLESHA, JAMES E. MABBUTT AND MYRON L. KERN, APPELLANTS,

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

BRIEF FOR APPELLEE

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STATEMENT

This is an appeal from a judgment denying recovery in an action brought in the United States District Court for the Northern District of California, Northern Division. Appellant Plesha instituted this suit against the United States in May 1950 (R. 3-6). Alleging jurisdiction under 38 U. S. C. 801-818, he sought to recover an amount which had been withheld by the United States from a special dividend which had been declared on his National Service Life Insurance Policy (government insurance for servicemen). The United States had applied the amount withheld to reimburse itself for its payment, on his behalf, of defaulted premiums on a commercial life insurance policy which had been issued on his life before he entered the armed forces and which he had later brought under the protection of the Soldiers' and Sailors' Civil Relief Act of 1940. Appellants Mabbutt and Kern, being similarly situated, intervened as parties plaintiff (R. 31, 28). In an opinion filed following a trial, District Judge Dal M. Lemmon held that the appellants were indebted to the United States for the amounts withheld and that the set-offs were proper (R. 110-123). The opinion is reported at 123 F. Supp. 593. The facts are as follows:

1. *As to Appellant Plesha.*—Three months before entering active service in the armed forces of the United States, Plesha obtained a $2,500 policy on his life from the California-Western States Life Insurance Company. Immediately after his entry into the service in March 1941, Plesha made application to his insurance company under the provisions of Article

IV of the Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1183-1186, 50 U. S. C. App. (1940 Ed.) 540-554 (*infra,* pp. 81-9), for the benefits and protection afforded by that Article in connection with this private life insurance policy.[1] The company submitted the application to the Veterans Administration which approved it and extended the Act's protection effective March 6, 1941. R. 126.

In May 1942, while he was in the service, the Government issued to Plesha a government life insurance policy, under the National Service Life Insurance Act, in the amount of $10,000. On November 1, 1945, the amount was reduced to $5000. This government policy was maintained in force by Plesha's payment of premiums until November 30, 1945. R. 4.

Meanwhile, Plesha failed to pay premiums on his commercial life insurance policy (R. 127), but because that policy was under the protection of the Soldiers' and Sailors' Civil Relief Act it did not lapse. See Sec.

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[1] As we show below (*infra,* p. 21 *et seq.*) the purpose of the Civil Relief Act was to suspend temporarily the enforcement of certain civil liabilities of persons serving in the armed forces so as to free them from injury and harassment in connection with their civilian affairs during their period of military service. Article IV of the Act was designed to protect a serviceman from having his private (*i.e.,* non-governmental) life insurance policy lapse for failure to pay premiums while he was in military service. The scheme of the insurance provisions of the Act is detailed below, pp. 26-29. Very briefly, it provided that upon application of the serviceman and his insurance company to the Veterans Administration, and upon VA's approval, the United States would guarantee the payment of premiums becoming due on the serviceman's commercial life insurance policy during the period of his military service and for one year thereafter. The insurer agreed to keep the policy in force during this time despite default of premiums. If the insured failed to pay the defaulted premiums within one year after the termination of his military service, the insurer could obtain payment from the United States.

405, *infra,* p. 84. Plesha was separated from the service on October 20, 1945. R. 126. When the Veterans Administration learned of his separation, it sent him VA Form Letter FL 9-63 (R. 287-9) advising him (a) that he might terminate the protection being afforded his private insurance under the Civil Relief Act or continue such protection until two years after his discharge date;[2] (b) that any premiums accruing on his private policy but not paid by him during the period of protection would, upon an accounting, become an indebtedness which he would owe his insurance company, subject to any credit allowed by the company for the then cash value of the policy; and (c) that the Government guaranteed the payment of this amount to the insurance company and that any amount not paid by him to the company would be paid by the United States "to whom you will then owe whatever payment the Government made on your account." R. 126-127. Hearing nothing from Plesha, the Veterans Administration terminated the protection of his private policy on October 20, 1947, two years after his discharge. R. 127.

Thereafter, Plesha's insurer, California-Western States Life Insurance Company, reported to VA that Plesha's defaulted premiums with interest at the policy loan rate (6% compounded annually) for the period the policy had been protected aggregated $343.93; that after crediting the cash surrender value of $82.88 there

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[2] Under the 1942 Amendment of the Civil Relief Act, the period of protection was enlarged from one to two years following insured's discharge (see Sec. 403, *infra,* p. 91). We are informed by the Veterans Administration that persons who had obtained protection under the original Act were automatically given this extended protection unless the insured expressed a contrary desire. See R. 287-9.

remained a balance of $261.05 subject to payment by Plesha or the Government. On January 2, 1948, a United States Treasury check in that amount was drawn and dispatched to the Company. R. 127.

During the following month Plesha was informed of this payment to his insurer and was notified that this amount represented a debt due by him to the Government. *Ibid.* In March he wrote to VA stating he was not in a position to make payment and asked what mode of payment he could use "in order to take care of this obligation." He was told he could discharge the obligation by making payments of $10 per month initially and later in increased amounts so as to "liquidate the entire indebtedness" within a year. Plesha accepted this plan of payment. He forwarded three checks totalling $40 which were credited to him by VA. There remained an unpaid balance of $221.05. R. 127-128.

In 1950, the Veterans Administration determined that Plesha's $10,000 NSLI policy was entitled to participate in a special dividend to the extent of $233.75, but it withheld payment of $221.05 because of its determination that he was indebted to the United States in that amount for the protection afforded his private policy under the Civil Relief Act. R. 128. It paid him the $12.70 balance, informing him that his indebtedness was thereby liquidated (R. 129), whereupon Plesha instituted this suit for the amount withheld.

2. *As to Appellant Mabbutt.*—Mabbutt obtained a private life insurance policy in the amount of $2,500 from the California-Western States Life Insurance Company (the same insurer as in the case of Plesha)

in December 1940, three months before he entered active military service. Like Plesha, he applied for protection of his private policy under the 1940 Act immediately after entry into the service. His application was approved by VA effective March 12, 1941. Thereafter he failed to pay premiums on his policy. He was separated from the service on December 25, 1945. At Mabbutt's and his insurer's request, the protection was terminated as of February 22, 1947. The company reported that on that date the aggregate of defaulted premiums with interest at the policy loan rate (6% compounded annually) was $269.25. After being credited with the cash surrender value of the policy ($63.50), the United States paid the insurer, pursuant to its guaranty under the Civil Relief Act, the net amount of $205.75. Mabbutt was informed of this payment on his behalf and was notified by VA that the sum paid represented a debt due by him to the United States. He ignored two requests for payment. R. 130-131.

Mabbutt had been issued a $10,000 NSLI policy which was maintained in force by his payment of premiums from October 6, 1942 to February 6, 1948. R. 32. In May 1950 VA advised him that this government policy was entitled to a special dividend of $352, that $205.75 was being deducted from this sum in liquidation of his indebtedness to the United States, and the balance of $146.25 was paid to him. R. 131. Mabbutt's complaint in intervention seeks recovery of the amount so deducted. R. 31-34.

3. *As to Appellant Kern.*—In December 1938 Kern was issued a private life insurance policy in the amount of $2000 by the same insurer. In June 1941 the com-

pany issued another policy to him, in the amount of $3000. Following his entry into active military duty and his application for protection of both policies under the Civil Relief Act of 1940, VA notified Kern and his insurance company that his policies would be protected effective with annual premiums due December 21, 1941 and June 23, 1942, respectively. R. 131-132.

Two years later, in December 1943, Kern informed VA that he had decided to pay the premiums on his private policies himself; he asked what papers had to be executed and "what options I may have to repay the Government for those premiums already paid by the Government on the above policies." In reply, VA informed him that it was unnecessary to execute any papers "as all premiums are to be paid direct to the insurance company when the insured is able to meet the premium payments." Kern, however, never did resume payment of his premiums. The protection of his policies was terminated February 8, 1948, two years after his separation from the service. R. 132.

The insurer reported to VA that the defaulted premiums plus interest at the policy loan rate (6% per annum) on Kern's 1938 policy totalled, for the period of protection, $461.70; that it had a cash surrender value of $394 applicable as credit, leaving a net amount due of $67.70. The company reported that the defaulted premiums with interest on Kern's other policy totalled $681.98; that there was a credit of $417.62 for cash surrender value, leaving a net balance of $264.36 unpaid for the period of protection. The aggregate indebtedness on the two policies was $332.06. The United States paid this sum to the insurer on Kern's

behalf in April 1948 and promptly notified Kern of this action. R. 133. In September, 1948, Kern was again advised of this payment and was notified that the sum paid was a debt due by him to the United States. In October he wrote VA that payment of the total indebtedness would be difficult, and requested that he be permitted to pay $5 per month initially. Thereafter he made payments totalling $30, reducing the balance owed to $302.06. R. 133-134.

Like the other plaintiffs, while in the service Kern had obtained a $10,000 NSLI insurance policy. He kept this in force by payment of premiums continuously from February 1, 1942 until the date of his complaint. R. 29. In 1949 he applied for the special dividend and VA determined that his policy was entitled to a dividend of $396. Against this amount, VA deducted and applied $302.06 in payment of the indebtedness due for protection of his commercial policies, and sent him two checks for the remainder, totaling $93.94. R. 134. Kern's complaint in intervention seeks recovery of the amount thus deducted. R. 28-31.[3]

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[3] The Court found that appellants' private policies contained provisions permitting the insureds to borrow from the insurer on the sole security of their policies, and that the policies did not impose on the insureds a personal liability to repay such policy loans (R. 135-6). He found, further, that pursuant to Sec. 408(2) of the 1942 Amendment of the Civil Relief Act (*infra*, p. 93-4), the insurer elected to settle its accounts with the United States as provided in Sec. 406 of the Amendment (*infra*, p. 92) (R. 135). Appellants were not consulted concerning this election, nor did they agree to any change in the relationship created by their application for protection and the approval of such applications (R. 137). A substantial number of other persons owning policies issued by appellants' insurer brought such policies under the protection of the 1940 Act. Of these, eight were terminated by death while the

4. *The Government's Answers.*—In its answers to the three complaints, the Government asserted (a) that the complaints fail to state a claim upon which relief can be granted; (b) that the district court had no jurisdiction over the causes alleged because a suit for recovery of dividends is not cognizable under 38 U. S. C. 817, and because there is no disagreement between appellants and VA with reference to the NSLI dividends within the meaning of 38 U. S. C. 817; and (c) that the dividends sued for had been paid partly in cash and partly by applying them in payment of appellants' debts to the United States. R. 6-7; 96-7; 103-4.

5. *The District Court's Decision.*—(a) The Court held that 38 U. S. C. 817, 445 and 551 conferred jurisdiction over the causes of action alleged. These sections permit suit in the event of a disagreement as to a claim for insurance benefits. Rejecting a 10th Circuit decision to the contrary,[4] the Court held that a claim for a dividend is a claim for an insurance benefit. He held, also, that there is a disagreement within the meaning of these sections. R. 112-116. (b) Proceeding to the merits, the District Court followed the decision in *United States* v. *Nichols,* 105 F. Supp. 543 (N. D. Ia.), app. dism'd, 202 F. 2d 956, 958 (C.A. 8), and held that upon appellants' application, the United States had guaranteed payment of their defaulted premiums; that under common law principles the United States would be entitled to reimbursement; and

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policies were protected. Thirty-eight policy holders either paid the insurer in cash the amount of unpaid premiums plus interest at the policy loan rate, or fully paid such premiums and interest by applying the cash value of the policies thereto. R. 137. The Court also made findings concerning the administration of the 1940 Act and statements about the Act made by VA officials (R. 136).

[4] *Candell* v. *United States,* 189 F. 2d 442, 444 (C.A. 10).

that neither the 1940 Civil Relief Act nor its legislative history indicate Congressional intent to abrogate that common law right of reimbursement. R. 116-117. Observing that no other country in the world has been so generous as the United States in its treatment of servicemen and veterans, Judge Lemmon quoted appellants' statement that "they expected the Government 'to give them a free ride in their private insurance' " (R. 110), and declared that in the absence of Congressional mandate, he was "not prepared to assist in this latest attempt to siphon off some more of the nation's already fast-ebbing public fisc" (R. 119). To impute to Congress an intent that these payments be a gift would result in serious discrimination and inequity (R. 118). (c) He held that when the Government paid appellants' premiums, there resulted, in effect, an overpayment to appellants and therefore the bar of 38 U. S. C. 454(a) (which prohibits the United States from offsetting debts against veterans' benefits, except in cases of overpayments) is not applicable (R. 119-123). (d) He rejected appellants' other arguments, such as the "increased liability" contention, as having no merit (R. 123).

Judgment denying relief was entered March 16, 1954 (R. 124). The notice of appeal was filed June 25, 1954 (R. 138-9).

QUESTIONS PRESENTED

1. Whether the District Court had jurisdiction over the causes alleged in the complaint;

2. Whether the appellants are obligated to reimburse the United States for its payment to their insurer, on their behalf, of their defaulted premiums on their private insurance policies after they requested that such

policies be protected under the Soldiers' and Sailors' Civil Relief Act of 1940; and if so,

3. Whether the indebtedness arising therefrom may be set-off against NSLI dividends payable to appellants.

SUMMARY OF ARGUMENT

I. The district courts have no jurisdiction to review decisions of the Administrator of VA except in the event of a disagreement as to a claim for an insurance benefit (38 U. S. C. 445, 817). An insurance benefit is a payment of money as indemnity for a loss insured against. Appellants are seeking recovery of a dividend; since a dividend does not fall within the definition of a benefit, there is no jurisdiction over the suit. Moreover, no disagreement under the NSLI Act exists, for there is no dispute between the parties regarding the right to, and the amount of, the dividend. The dividend involved has been paid and the Administrator's determination as to the manner of payment is final. The disagreement in this case relates not to the dividend, but to whether appellants were indebted to the Government under the Civil Relief Act. Thus, the second jurisdictional prerequisite to a suit under the NSLI Act is lacking.

II. a. The Soldiers' and Sailors' Civil Relief Act of 1940 is substantially identical to and virtually a reenactment of the Civil Relief Act of 1918. The legislative history and administrative construction of the 1918 Act are essential guides to the interpretation of the 1940 Act. Both were intended to protect servicemen from prejudice and harassment in connection with their civilian affairs during their period in uniform. To that end, the Acts temporarily suspend the enforce-

ment of certain civil liabilities of servicemen. The liabilities are not forgiven or wiped out, but only deferred.

Insurance is covered by Article IV of both Acts. Recognizing that failure to pay premiums would result in the lapse and forfeiture of private policies, Congress provided that, upon request of the insured and upon consent of the insurer to keep the policies in force despite default of premiums, the United States would pay the defaulted premiums with interest if the insured did not after his separation from the service. The history of the 1918 Act discloses, beyond any question, that Congress intended to create a transaction of guaranty involving a primary debt from the insured to his insurer for premiums accruing during the insured's military service and one year thereafter, and a guaranty of that indebtedness by the United States. The provisions of Article IV were written specifically to meet the objections of the insurance industry to a proposed bill which failed to provide for such an indebtedness. As revised and passed, the bill provided for a consensual arrangement and included provisions manifestly intended to safeguard the United States against any loss as guarantor (*e.g.,* the United States is given a first lien on the policy; it is credited with the cash surrender value of the policy on settlement, etc.). The legislative discussions and the terms of the Act demonstrate that it was not intended to bestow a gratuity, and that Congress contemplated that the United States be reimbursed by the insured for its payments on his account.

b. In construing the 1918 Act, the Veterans Bureau applied elementary principles of the law of guaranty, viz., that the principal debtor (the insured serviceman)

must reimburse the guarantor (the Government) for its payment of his debt (premiums) to the creditor (the insurance company). The Bureau sought and obtained reimbursement from servicemen who had applied for and received the protection of the 1918 Act, and it formally advised Congress of this administrative construction. In 1940, Congress reenacted the 1918 Act without material change and without any indication of disapproval of this construction—indeed, the only time the question of reimbursement arose while reenactment was being considered, the House was told that the law would require the insured to make repayment. Any mistaken representations later made by officials on the question cannot bind or estop the Government.

In 1942 Congress amended the 1940 Act by providing expressly that these payments by the United States "shall become a debt due to the United States" and shall be collectible from the insured. This amendment, which simply wrote into the statute the recognized common law principle applicable to all guaranties, did not change the 1940 Act in that respect. It merely made explicit what theretofore had been implicit. The amendment was described in Congress as a clarification and liberalization of the 1940 Act, terms which would be wholly inapposite if appellants' views were correct that what had been a gratuity would thereafter be a debt.

c. Having requested and received insurance coverage from his insurer, the insured was under a primary obligation to the insurer to pay the defaulted premiums. The United States, as a guarantor, paid that debt on his behalf and is entitled, under common law principles, to be reimbursed. The transaction was described re-

peatedly by the Congress, in debates and reports, as a guaranty. When Congress utilizes a legal transaction familiar to the common law, it must be assumed that Congress meant to give that transaction the same incidents and consequences as would result from such a transaction at common law; where the transaction is a guaranty, the guarantor is entitled to reimbursement even in the absence of an express agreement by the principal debtor. The specific remedies given by the Act to the United States (lien, credit for cash surrender value, etc.) are provisional in nature and manifestly were intended to safeguard and supplement, rather than to replace, the common law remedy of reimbursement. To hold that the insured may escape reimbursement would create inequitable and discriminatory results.

III. The *Gilman* decision, 347 U. S. 507, is an exception to the historic rule that no express statutory authority is needed for the United States to enforce established rights which others, similarly situated, would have. The unique considerations involved in *Gilman* which led to the exception, are not present here. In any event, Congress has indicated a position requiring the insured to reimburse the United States.

The *Hormel* case (123 F. Supp. 806), on which appellants place primary reliance, is erroneous. Appellants' argument, based on *Hormel,* that the lien on the policy provides the sole remedy of the Government—because of the supposed impossibility of determining the amount of the claim for reimbursement—is self-defeating, for, by the same reasoning, it would be impossible to determine the amount which the lien secures.

IV. The United States has the same right of set-off which every creditor has. While 38 U. S. C. 454a ex-

empts veterans' benefits from set-off, it does permit the set-off of overpayments made under veterans laws. Under the consistent administrative practice and construction, a payment of a veteran's debt on his behalf under a law relating to veterans constitutes such an overpayment. Accordingly, the United States had the right to set-off appellants' indebtedness against their dividends.

ARGUMENT

Preliminarily, it should be noted that the question on the merits presented in this case has never been passed upon by an appellate court. The question is of major importance because there are still outstanding thousands of Civil Relief Act reimbursement claims like those here involved, representing in the aggregate a very large sum.[5] The problem was first considered in 1943 by the Administrator of VA who ruled that a debt rather than a gratuity resulted from the Government's payment of the insured's defaulted premiums. *Decisions of the Administrator of VA, No. 513,* Vol. 1, p. 781. Four years later in a decision which carefully and extensively reexamined the question, the Administrator reaffirmed his earlier ruling. *Decisions, supra, No. 742,* Vol. 1, Supp., p. 93 (set out at R. 62-94). Subsequently, the issue was litigated in four reported district court cases apart from the instant one. The first and leading case is *United States* v. *Nichols,* 105 F. Supp. 543 (N. D. Ia.) app. dism'd, 202 F. 2d 956, 958 (C. A. 8) where, after a comprehensive analysis of the

[5] Through June 30, 1942, VA had approved more than 23,400 applications for protection of private insurance policies under Article IV of the 1940 Act, representing insurance in the face amount of over $56,500,000. By that date the Government had issued certificates to insurers guaranteeing defaulted premiums in an amount of almost $1,017,000. See *Annual Report of the Administrator of Veterans Affairs for the Fiscal year Ending June 30, 1942, p. 31.*

Act and review of its history, the court held that the United States is entitled to reimbursement. *Morton* v. *United States,* 113 F. Supp. 496 (E. D. N .Y.) and the decision below reached the same result. *Hormel* v. *United States,* 123 F. Supp. 806 (S. D. N. Y.) and *United States* v. *Hendler,* 123 F. Supp. 383, holding otherwise, are discussed below, p. 57, *et seq.* Both are pending appeal.

I

The Trial Court Had No Jurisdiction of this Action

It is settled law that no action lies against the United States unless the Congress has authorized it. *United States* v. *Shaw,* 309 U.S. 495; *Munro* v. *United States,* 303 U.S. 36. When the Congressional authorization is a restricted one, there must be "due regard" for "such restrictions as have been imposed." *Dalehite* v. *United States,* 346 U.S. 15, 31. Congress has provided (38 U.S.C. 11a-2) that no court shall have jurisdiction to review any decision of the Administrator of Veterans Affairs "on any question of law or fact concerning a claim for benefits or payments under any Act administered by the Veterans' Administration" *except* as provided in 38 U.S.C. 445 and 817 (*infra,* pp. 94-6, 97). Appellants argue that the latter sections furnish the requisite jurisdiction in this case.

Sec. 817, which is part of the National Service Life Insurance Act (an Act administered by the Veterans Administration) provides that in the event of a disagreement as to any claim under that Act, suit may be brought under the conditions set forth in Sec. 445. And Sec. 445 states that suit may be brought in the district courts "in the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the Veterans' Admin-

istration and any person or persons claiming thereunder". It states further that, as used in this Section, the term *claim* "means any writing which alleges permanent and total disability at a time when the contract of insurance was in force, or which uses words showing an intention to claim insurance benefits"; it defines *disagreement* as "a denial of the claim by the Administrator of Veterans' Affairs or someone acting in his name". It is apparent, then, that the district court had no jurisdiction over this suit for NSLI dividends unless (1) appellants have filed a "claim" for "insurance benefits", and (2) the Administrator has denied this claim, thereby giving rise to a "disagreement". Appellants have not met either of these jurisdictional requirements.

1. Unless a NSLI dividend falls within the meaning of the term "insurance benefit," it is obvious that appellants' application for that dividend cannot come within the statutory definition of a "claim". Apart from the decision below, we know of only one court, the Tenth Circuit, which has specifically passed on this question: in *Candell* v. *United States,* 189 F. 2d 442, a suit involving NSLI dividends, the Tenth Circuit held that a NSLI dividend is *not* an insurance benefit, that an insurance benefit is something paid as indemnity for a loss insured against, and, consequently, that the district court had no jurisdiction over the subject matter in controversy.[6]

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[6] Defining a contract for insurance as an agreement whereby the insurer, for a consideration, undertakes to indemnify the insured or his designee against loss from a specified future contingency, the Court, per *Phillips, C.J.,* went on (189 F. 2d at 444-5; emphasis added):

> *An insurance benefit means money or its equivalent paid as indemnity for a loss insured against.* A dividend upon a Na-

Appellants seek to avoid the result reached in the *Candell* case by arguing that, if "a dividend is a return of premium" as held in *Candell,* then a suit upon a dividend falls specifically within the terms of 38 U.S.C. 445: "In the event of disagreement as to claim, including claim for refund of premiums * * *" (Op. Br., p. 9). But a return of premiums in the form of a *dividend* is not a "refund of premiums" within the meaning of that Section. The "refund of premiums" which may be the subject of a disagreement under Sec. 445 was added to the Section by an amendment in 1930 (46 Stat. 1016) so as to permit suit for premiums refundable by reason of the insured being entitled to a waiver of premiums, as where he is totally disabled. A "refund of premiums" was thus a contingency insured against and a "benefit" under the contract, along with disability benefits and death benefits. A dividend, on the other hand, as the *Candell* case holds, is available only because the aggregate payment of premiums exceeds the amount needed to meet "benefit" payments.[7]

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tional Service Life Insurance policy is paid under the terms of the contract which gives the insured the right to participate in gains and savings of the National Service Life Insurance Fund as they may be determined by the Administrator. *Such a dividend is a return of premium* [citations omitted]. *Such a dividend has no relation to the obligation to pay indemnity on the happening of the loss insured against* [citations omitted].

Sections 602 and 607 of the National Service Life Insurance Act, as amended, 38 U.S.C.A. §§ 802 and 807, employ the term "benefits" and "insurance benefits", but in each instance where the terms are used, the context makes clear that they refer to payments made upon the death or disability of the insured.

Accordingly, we conclude that the instant action is not upon a claim within the meaning of [38 U.S.C. 817], and that the trial court was without jurisdiction.

[7] In holding that a dividend is an insurance benefit, contrary to the *Candell* case, Judge Lemmon pointed to the language of 38

2. Even if it be assumed *arguendo* that a dividend is an insurance benefit, there is no jurisdiction because the case presents no disagreement as to a claim under the NSLI Act.[8] This suit involves two separate and distinct elements, first, appellants' claim for dividends under the NSLI Act, and second, the Government's separate claim for reimbursement under the Civil Relief Act. The dispute in this case relates to the Government's claim under the Civil Relief Act; there is no dispute as to the dividends.[9] The Administrator agrees with appellants as to their right to and as to the amount of the NSLI dividends. In fact, without this initial agreement that the dividends were owing to appellants, there would have been no occasion for application of those dividends in payment of appellants' indebtedness under the Civil Relief Act. The Administrator contends, however, that the dividends were paid, partly in cash and the remainder in discharge of appellants' separate indebtedness to the United States. A disagreement as to the manner in

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U.S.C. 454a and stated that it was part of the very statute being construed in *Candell* (R. 113). He apparently was not aware that when Sec. 454a was adopted by reference into the NSLI Act via 38 U.S.C. 816 (54 Stat. 1014, approved Oct. 8, 1940), it did not contain the language to which he referred. Those words were added by amendment later (54 Stat. 1195, approved Oct. 17, 1940). Accordingly, there was no warrant for reliance upon language subsequently injected into an Act covering a different subject.

[8] There can be no doubt that a disagreement, *i.e.*, "a denial of the claim by the Administrator" (38 U.S.C. 445), is a jurisdictional requirement. *Berntsen* v. *United States*, 41 F. 2d 663 (C. A. 9); *United States* v. *Densmore*, 58 F. 2d 748 (C.A. 9), cert. den. 287 U.S. 598; *Bono* v. *United States*, 113 F. 2d 724 (C.A. 2); *Tohulka* v. *United States*, 204 F. 2d 414 (C.A. 7); *Leyerly* v. *United States*, 162 F. 2d 79 (C.A. 10).

[9] See fn. 11, *infra*, p. 19.

which dividends are paid is not the kind of disagreement covered by Secs. 817 and 445.[10]

3. Two other district courts ruled that they had jurisdiction in this type of case, but neither placed any reliance on Sec. 817. *Morton* v. *United States,* 113 F. Supp. 496 (E.D. N.Y.); *Hormel* v. *United States,* 123 F. Supp. 806 (S.D. N.Y.) (appeal pending).[11] Instead, both held that jurisdiction may be founded on the Tucker Act, 28 U.S.C. 1346 (a) (2). Manifestly, however, the Tucker Act is not applicable, for it only authorized the district courts to sit as a court of claims, and "the authority thus given to adjudicate claims against the United States does not extend to any suit which could not be maintained in the Court of Claims." *United States* v. *Sherwood,* 312 U.S. 584, 590-591. It is clear that the Court of Claims has no jurisdiction over suits based upon insurance policies administered by the Veterans Administration generally and NSLI policies in particular—Congress has vested such jurisdiction exclusively in the district courts under 38 U.S.C. 445 and 817. *Peyton* v. *United States,* 100 F. Supp. 823

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[10] 38 U.S.C. 805 states that the NSLI fund shall be available for dividend payments, and that "Payments from this fund shall be made upon and *in accordance with awards by the Administrator.*" (Emphasis added.) Similar language appears in the NSLI policy. The United States did not undertake as a part of its contract to pay dividends to this policyholder. The Administrator's determination in that regard was final. 38 U.S.C. 11a-2.

[11] In *Hormel* the district judge pointed out that "there is no controversy" over any claim for NSLI benefits; that it is "conceded that plaintiffs are entitled to the full dividend under such policies. The decision that the Administrator has made and of which they complain is the decision that they owe the Government reimbursement for payments made by the Government under a different Act, the Soldiers' and Sailors' Civil Relief Act." 123 F. Supp. at 809-810.

(C. Cls.), certiorari denied, 343 U.S. 909; *Holliday* v. *United States,* 87 F. Supp. 367 (C. Cls.). *Prouty* v. *United States,* 94 F. Supp. 320 (D. N.H.); *Byrd* v. *United States,* 103 F. Supp. 128 (N.D. Oh.).

4. In rejecting the authority of the Tenth Circuit's holding in the *Candell* case, 189 F. 2d 442, the court below (R. 114) cited and quoted *United States* v. *Zazove,* 334 U.S. 602, 611-612, for the proposition that Congress intended that the courts should have review power over the Administrator's decision on insurance matters generally. The *Zazove* case, however, does not go that far. That case did not modify or involve the scope of 38 U.S.C. 445 and 817. Instead, it involved the effect of an amendment of 38 U.S.C. 808, which, the Supreme Court noted (334 U.S. 612), was indicative of Congressional concern that VA's *regulations* be subject to judicial scrutiny. That such amendment and that the quoted language of the *Zazove* opinion do not effect a broadening of the jurisdiction granted by Sec. 817 is apparent from later decisions discussing that question. *Rowan* v. *United States,* 211 F. 2d 237 (C.A. 3), aff'g 115 F. Supp. 503 (reviewing the cases); *Mitchell* v. *United States,* 111 F. Supp. 104, 107 (D. N.J.); cf. *United States* v. *Fitch,* 185 F. 2d 471, 474 (C.A. 10).[12]

The court below seems to have been influenced by the fact that the United States has itself invoked the juris-

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[12] That the Administrator's determination is final not only as to the denial of a claim but also as to a decision for recovery or restitution where moneys have already been paid, see *United States* v. *Gudewicz,* 45 F. Supp. 789 (E.D. N.Y.); *In re Rosa's Estate,* 172 Misc. 808, 16 N.Y.S. 2d 285; cf. *United States* v. *Mroch,* 88 F. 2d 888, 890 (C.A. 6). Also see 50 U.S.C. App. 547 providing that the Administrator's determinations of fact and law in administering Article IV of the Civil Relief Act shall be final.

diction of the district courts to recover reimbursement under the Civil Relief Act (R. 115-6). This ignores the established rule that the forum is always open to the sovereign to bring suit in its own behalf, even as to matters in which it is itself immune for suit. See 28 U.S.C. 1345; and see *infra,* pp. 58-60.

II

The Insurance Provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 Created a Transaction of Guaranty

The 1940 Act has its roots in the Soldiers' and Sailors' Civil Relief Act of March 8, 1918, 40 Stat. 440, enacted during World War I. The 1918 Act is set out in Appendix A, *infra,* pp. 73-80. The general purpose of that Act and that of 1940 are identical and their language is virtually the same. Indeed, the 1940 Act has been described by the Supreme Court as a "substantial reenactment" of the 1918 Act (*Boone* v. *Lightner,* 319 U. S. 561, 565), and by its draftsmen as "an up-to-date revision" of the 1918 Act.[13] Because of this close affinity, recourse to the legislative history of the 1918 Act and to its administrative construction are pertinent and instructive in interpreting its later reenactment. Cf. *ibid.,* 319 U. S. at 365-9.

A. *The legislative history of the 1918 Act demonstrates that Congress intended the transaction to be one of guaranty*

1. The original draft of the 1918 Act was prepared by the War Department under the supervision of eminent attorneys headed by Dean John H. Wigmore, then serving as an officer in the Office of the Judge

[13] Letter of Secretary of War Stimson to the Speaker of the House, H. Rept. No. 3001, 76th Cong. 3d Sess., p. 5.

Advocate General. As stated in the letter of transmittal to the Congress from the Secretaries of War and of the Navy, the bill was intended "to free persons in the military service of the United States from harassment and injury to their civil rights during their term of service and to enable them to devote their entire energy to the military needs of the Nation." [14] It was emphasized that this objective was to be achieved *not* through a gratuitous discharge of civil liabilities, but rather by providing a temporary suspension of remedies which, if enforced against servicemen while they were away, might prejudice their civilian affairs. The method of the Act was to preserve creditors' rights but to suspend or postpone proceedings and transactions during the soldier's or sailor's absence, "so that he may have an opportunity, when he returns, to be heard and to take measures to protect his interest." [15]

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[14] *Hearings and Memoranda before the Subcommittee of the Committee on the Judiciary, U. S. Senate*, 65th Cong., 1st and 2d Sess., on S. 2859 and H. R. 6361, p. 5.

[15] *Op. cit., supra*, fn. 14. Introduced in the Senate as S. 2859 on September 11, 1917, and in the House as H. R. 6110 one week later, the bills were referred to the respective Committees on the Judiciary. Testifying before the House Committee, Dean Wigmor stated as to the original draft: "In every one of the 8 or 10 measures calculated to relieve a specific need of the soldier or sailor * * * we stopped at suspending the remedy. In no instance, so far as I in good faith can say, is any man's rights or property taken from him, lost, or destroyed. He is simply held back for a time in his remedy. There is a soldier going to war. The creditor comes in and we say, 'Hold on, hold back. That man is away in the army. He is fighting for you. Wait until he comes back. Do not jump on him while he is away. *You will have every remedy back in your hands the minute that he is returned* and has gotten himself together and got his uniform off.' * * * The whole theory is simply to hold the hand. Throughout the bill, so far as I am able to see it, *there is nothing more done than suspension of remedy.*" *Ibid.*, p. 87 [emphasis added].

In general, the bill conferred wide discretionary powers upon the courts to grant stays in proceedings and transactions involving servicemen; it virtually barred default judgments against persons in service; and it had specific provisions to safeguard servicemen with regard to contracts which impose a continuing liability, such as leases, mortgages, installment purchases, etc. See *op. cit., supra,* fn. 14, at pp. 27-28.

Insurance contracts were regarded as being in the latter category. As to life insurance, the proposed law prohibited the forfeiture or lapse of certain policies of servicemen for nonpayment of premiums falling due during their period of military service. It provided that such defaulted premiums shall be charged to the policy as a loan and could be paid by the insured with interest at the policy loan rate at any time within six months after the termination of the insured's military service.[16] Spokesmen for the insurance industry appeared before the Senate Committee considering the bill and vigorously objected to this feature of the bill. They asserted that it would compel the insurance companies to maintain policies in force despite nonpayment of premiums, contrary to the terms of the insurance contract; that in reality the serviceman was being given an option to pay or not to pay his defaulted premiums, as he saw fit, upon his return from the war, because the bill failed to provide a consensual and enforcible obligation with reference to premiums accruing in the

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[16] Sec. 13 of S. 2859, 65th Cong., 1st Sess.; *op. cit. supra,* fn. 14, at pp. 18-21, 31. The section also suggested machinery under which the beneficiaries of servicemen whose premiums were in default could contact relief organizations who would render assistance in payment. *Ibid.*

future; in other words, there would be no debt running from the insured to the insurer.[17]

Discussion at the Senate Hearings indicated a common desire by members of the Committee to afford protection of some kind with regard to servicemen's outstanding private insurance but strong opposition to providing free insurance or to forcing the companies to maintain the policies while the serviceman would have an election to pay or not to pay his defaulted premiums upon his return to civilian life. Senator Reed, one of the most active participants at the Senate Committee hearings, declared that it was "absurd" to propose that "at the end of the war the soldier shall have the option to pay or not to pay, as he sees fit. * * * I did not think it would be claimed that a thing of that kind could be done." *Op. cit. supra,* fn. 14, at p. 114.[18] Finally, after considerable discussion, Dean Wigmore suggested that these objections could be eliminated by modifying the bill so as to provide for a *guaranty* by the Government that the

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[17] They explained that under the usual contract of insurance both parties agree that the premium paid shall keep the policy in force only until the date on which the next premium becomes due; the policyholder is not under any obligation to pay the succeeding premium—if he chooses to pay, the insurance contract remains in force until the subsequent premium becomes due, but if he chooses not to pay, the contract terminates. If the company nevertheless continued to extend insurance coverage, as the bill required it to do, it was feared that the company would have no legally enforcible claim against him for future premiums because the policyholder had never requested or agreed to renewal of his contract. *Op. cit. supra,* fn. 14, at pp. 102 *et seq.*

[18] It may be noted in passing that this is precisely the result which would be reached if appellants' contentions in the present case are sustained and if the decision below is reversed: the insured would be held to have an option to pay or not to pay his defaulted premiums, as he pleases.

premiums would be paid. The Committee welcomed this suggestion and directed that he sit down with industry representatives and draft such a provision.[19]

2. Three days later, after having worked with the company representatives, Dean Wigmore reappeared before the Committee with a draft of a separate act entitled "A Bill to provide a mode of *guaranty* against lapse or forfeiture of life insurance policies held by persons in military service."[20] Its provisions (which, with minor changes, were later enacted as Article IV of the 1918 Act and ultimately were incorporated in the 1940 Act) were substantially different from those proposed in the original bill. The latter had merely imposed a flat prohibition of lapse of policies for nonpayment of premiums; the arrangement was nonconsensual and therefore, as the industry had argued, offered no assurance to insurance companies that they

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[19] "Maj. WIGMORE. * * * I am sure I do not want the Government to pay my insurance premiums, and there must be thousands like that who do not want any favors or charities in that way. If the suspension of those forfeitures, from the point of view of Mr. McIntosh [a spokesman on behalf of the insurance companies], will impose an undue burden on the companies, why can you not get at it in that way by simply, through an act of Congress, guaranteeing them against losses? Then all of us who go on paying our policies are taken care of in their own way, and those of us who have, by inadvertence, not paid our premiums, would be taken care of, and thus not throw an undue burden on them.

"Senator FLETCHER. That is a sound suggestion.

"Maj. WIGMORE. There is no constitutional objection to that.

"Senator OVERMAN. Suppose you draw up such an amendment as that.

"Senator REED. That is a practical suggestion. Sit down with these gentlemen representing the companies and agree on a section that will carry out this suggestion." *Op. cit. supra,* fn. 14, at p. 120.

[20] Emphasis added. The full text of the draft bill is set out at pp. 124-131, *op. cit. supra,* fn. 14.

would ever receive or even have the right to enforce the payment of premiums for the period during which the proposed law required that they keep the policies in force. The new bill, however, not only provided for a consensual arrangement, thereby furnishing a foundation for a legal claim by the insurance company against the insured for payment of defaulted premiums, but also provided a firm guaranty by the Government that these premiums would be paid.

In brief, the new proposal provided (and the 1940 Act is virtually the same) that the protection afforded by the Act was to be available only if the serviceman filed appropriate application with his insurance company. The form to be used was to state specifically that the making of the application "is a consent to such modification of the terms of the original contract of insurance as is made necessary by the provisions of the Act." The bill provided further that by receiving the original and thereafter filing a copy of this application with the Bureau of War Risk Insurance (now the Veterans' Administration), the insurance company shall be deemed to have assented to such modification.[21] It should be observed at this point that these provisions spell out the voluntary and consensual arrangement between the insured and the insurer. Contrary to appellants' statement (Op. Br., p. 42), under the Act, neither party was compelled to go forward. The law did not compel the serviceman to keep his private insurance in force; nor was the insurance company compelled to keep the policy alive even after the serviceman had elected to do so by the filing of his

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[21] These terms appear in Sec. 401 of the 1940 Act, *infra*, p. 82.

application. Only when both parties to the contract agreed did the insurance policy remain in force.

Upon receipt of the application, the Bureau of War Risk Insurance (the VA under the 1940 Act) was to determine the eligibility of the applicant and of his policy and immediately to notify both the insured and the insurer of its approval. The protection afforded was limited to life insurance policies in a face amount not exceeding $5,000.[22]

The bill provided that no policy thus brought within the benefits of the Act shall lapse or be forfeited for nonpayment of premiums during the insured's period of military service and for one year thereafter.[23] It further provided for a monthly accounting between the insurance companies and the Government.[24] Each month every company whose policies were protected was to render a report to the Bureau of War Risk Insurance listing *inter alia,* with reference to the protected policies, the premiums defaulted during the past month, listing also the defaulted premiums paid

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[22] These terms appear in Secs. 402-404 of the 1940 Act, *infra,* pp. 83-4. Under the new bill drafted by Dean Wigmore and the industry representatives, insurance contracts were not eligible for the Act's protection unless they "were made and *two full years premiums* were paid thereon before September 1, 1917" (*op. cit. supra,* fn. 14, at p. 126; emphasis added). As enacted, however, the 1918 Act limited eligibility to contracts made and on which *a* premium was paid before September 1, 1917; since the bill was enacted March 8, 1918, this meant the policy had to be approximately six months old. 40 Stat. 440. And this requirement was further reduced under the 1940 Act which permitted protection when the contract was "made and a premium was paid thereon before the date of approval of this Act or not less than thirty days before entry into the military service." Sec. 402, *supra.*

[23] This appears in Sec. 405 of the 1940 Act, *infra,* p. 84. The Section provides, however, that the prohibition against lapse shall not extend for more than one year after expiration of the Act.

[24] This appears in Sec. 406 of the 1940 Act, *infra,* pp. 84-5.

on such policies by the insureds during the past month, and computing the difference in the two amounts. Upon verification by the Bureau of this "monthly difference," the Secretary of the Treasury was to deliver an equivalent amount of Government bonds to the insurer each month to "be held as security by the respective insurers as security for the payment of the defaulted premiums with interest." [25] In the event of the death of the insured, the previously defaulted premiums with interest at the policy loan rate were to be deducted from the proceeds of the policy. Such deduction was to be credited to the Government in the next monthly report as premiums paid. [26]

If the insured did not within a year after the termination of his military service pay to the insurance company all past due premiums with interest at the policy loan rate, the policy was to lapse and become void. In that event, the insurer was to become liable immediately to pay the cash surrender value of the policy. [27] However, "*to indemnify it against loss,*" the United States was to have a first lien upon the policy. [28] One year following the end of the war there was to be an account stated between each insurer and the United States. In that account the United States was to be credited with the amount of the cash surrender value of

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[25] In lieu of bonds provided for in the 1918 Act, Sec. 407 of the 1940 statute (*infra,* p. 86) directed that each month the Administrator of VA deliver to each insurer a certificate in the amount of the monthly difference. The certificates were payable within 60 days after the final accounting between the insurer and the Government and were to bear interest at a rate to be prescribed by the Secretary of the Treasury.

[26] This appears in Sec. 409 of the 1940 Act, *infra,* p. 86-7.

[27] This appears in Sec. 410 of the 1940 Act, *infra,* p. 87.

[28] Emphasis added. This appears in Sec. 408 of the 1940 Act, *infra,* p. 86.

each lapsed policy up to the amount of the unpaid premiums with interest at the policy loan rate. At that time and upon surrender of the bonds (certificates under the 1940 Act), the total balance in favor of the insurer was to be paid by the United States. [29]

3. The revised insurance provisions were considered at subsequent hearings. *Op. cit. supra,* fn. 14, at p. 123 *et seq.* Dean Wigmore testified that the new proposal met the objections of the industry. *Ibid.* at p. 132. He agreed with Senator Overman's interpretation that under the new proposal the serviceman would be subject to a debt, for he would owe the premiums to the insurance company, [30] and that if he failed to pay that debt, the Government would (*id.* at p. 134). Questioned as to whether the Government could obtain repayment from the serviceman, Dean Wigmore answered affirmatively and went on to explain that in his belief the cash surrender value of the policy, which was subject to the Government's lien, would in most instances be sufficient to recoup the expenditure. [31] *Id.,* at 135. He was not asked and therefore furnished no specific answer to whether, in his view, the Government would be denied the right of recourse against the serviceman for any deficiency. On the other hand, he had stressed earlier that the whole approach in writing the original bill was merely to suspend remedies for a temporary period, and not to deprive any creditor of his

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[29] This appears in Secs. 411, 412 of the 1940 Act, *infra,* pp. 87-8.

[30] Compare the industry's objections to the original bill which failed to provide an enforcible obligation of the insured, *supra,* pp. 23-4.

[31] Under his revised proposal, a policy was not eligible for protection unless at least two full years' premiums had been paid by the serviceman. But see fn. 22, *supra,* p. 27.

rights. See pp. 21-24 and fn. 15, *supra*. The revised insurance provisions did not change that approach; rather, they were designed to strengthen it. They were intended to meet the unique problem of insurance contracts by creating a debt enforcible against the policyholder for the unpaid premiums, and, through the Government's guaranty, assuring prompt payment of that debt.

Meanwhile, apart from the insurance provisions of the Civil Relief Bill initially submitted to the Congress, the House Committee found it desirable to make certain other changes. As a result, it was rewritten and the revised version was introduced as a new bill (H. R. 6361, 65th Cong., 1st Sess.). The separate insurance bill, which Dean Wigmore and the industry spokesmen had worked out to effectuate a governmental guaranty of payment of defaulted premiums, was, with only slight change, included as Article IV of this new bill.

Reporting the bill favorably, the House Committee on the Judiciary described the insurance Article as providing "a scheme for the Government to carry the premiums on not more than $5,000 of life insurance of a man in military service who is unable to pay this premium." H. Rept. No. 181, 65th Cong., 1st Sess., p. 7. While the Report has no specific reference to the question of whether the serviceman will be obligated to reimburse the Government if it is called upon to pay his defaulted premiums, there are a number of indirect indications that a debt rather than a gratuity arises at that point. Thus, the Report distinguishes between the "boon" or gratuity provided under the war-risk (government) insurance bill and the instant

arrangement.[32] The voluntary and contractual nature of the transaction contemplated by the bill was also a subject of comment.[33] And in numerous places the relationship of the Government to the transaction was specifically termed a "guaranty."[34]

With but minor changes,[35] the bill was passed by both houses of the Congress and was enacted into law on March 8, 1918, 40 Stat. 440.

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[32] "The insurance provisions of the bill cover an entirely separate field from the insurance provisions of the war-risk insurance bill. That bill gives new insurance to soldiers and sailors *as a boon from the Government;* this section protects rights in insurance previously bought by the soldier or sailor with his own money and already in force." H. Rept. No. 181, *supra,* p. 7. [Emphasis added.] And see the earlier remarks of Senator Reed (*supra,* p. 24) that it would be absurd to give the soldier an option to pay or not pay, as he sees fit. Cf. fn. 15 and *supra,* pp. 22, 24.

[33] "This change in the original contract of insurance is agreed to by requiring the soldier who wishes to take advantage of the bill to make an application, signed by the beneficiary when legally necessary. When the application is filed by the company, it also accepts the change in the contract." H. Rept. No. 181, *supra,* p. 7.

[34] The report speaks of the soldier obtaining a "Government *guaranty* upon an aggregate of [not] more than $5,000 of insurance" (*ibid,* p. 7); and states that the "*guaranty* continues as to all premiums on accepted policies until a year after the war * * *" (*ibid.,* p. 8). Speaking of the likelihood that the Government's financial burden will not be large, the report states, "In the first place the Government only *guarantees* the payment of the premiums. If the soldier dies the insurance company will get its premiums out of the policy and the Government's *guaranty* will not be called upon. If the soldier comes back from the war he will repay the premiums if he continues the policy, and if he lets the policy lapse the Government will be subrogated to his rights. * * * In the nature of things it is impossible to say what the amount of this liability will be. But it is plain that it will be very small, especially when we remember that the *guaranty* does not apply to more than $5,000 of insurance on any one life." *Ibid.,* pp. 8-9. [Emphasis added.]

[35] See H. Rept. No. 344 (Conference Report to accompany H. R. 6361), 65th Cong., 2d Sess.

B. *The 1918 Act was construed administratively as a guaranty and as requiring reimbursement*

Although the word "guaranty" does not appear in the language of Article IV of the 1918 Act,[36] its provisions and the foregoing legislative history indicate beyond any doubt that the transaction envisaged by the Congress was one of guaranty, a concept which is, of course, familiar in the common law. The legislative background and the terms of the statute clearly indicate also that Congress was not bestowing a gratuity but was in fact contemplating reimbursement for the sums paid under the guaranty. This will be discussed more in detail elsewhere (*infra*, p. 44 *et seq.*). However, it is important at this point, before proceeding to the 1940 Act, to consider the administrative construction and operation of the 1918 Act, for it is familiar law that an administrative interpretation or practice "is not to be overturned unless clearly wrong, or unless a different construction is plainly required." *United States* v. *Jackson,* 280 U.S. 183, 193; *United States* v. *Citizens Loan Co.,* 316 U.S. 209, 214. Moreover, since Congress did not indicate any disapproval of that interpretation or make any relevant changes when the 1918 Act was reenacted in 1940, it must be presumed that Congress approved that interpretation (see *infra,* p. 56).

From the very outset, the 1918 Act was construed by the Treasury Department's Bureau of War Risk Insurance, which administered it, as providing a guar-

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[36] As already noted (*supra*, p. 25), the word had been in the title of the revised separate insurance bill drafted by Dean Wigmore and the insurance industry representatives. The title was dropped, however, when that bill was inserted as Article IV of the Civil Relief Act.

anty.[37] It was so construed by the Bureau of the Budget and the President concurred.[38] That the Government was not bestowing a mere gratuity but was in fact contemplating reimbursement for sums expended is reflected in the application which servicemen were required to sign in order to obtain the benefits of the Act.[39] While the application is not

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[37] *Memorandum Regarding Life Insurance of Men in Active Military Service under the Soldiers' and Sailors' Civil Relief Act,* (G. P. O. 1918), p. 3. This printed pamphlet distributed by the Treasury Department for the use and information of insurance officers in explanation of the Act states that the "Government will *guarantee* to the insurance company or organization the payment of premiums * * *." [Emphasis added.]

[38] In May 1922, President Harding transmitted to Congress a request for a $25,000 appropriation for the Veterans Bureau to effect a settlement with the insurance companies in accordance with the final accounting provisions of the 1918 Act. House Document No. 308, 67th Cong., 2d Sess. Transmitted with the President's communication was a letter from the Director of the Bureau of the Budget, in which the President stated he concurred, which explained that the 1918 Act had provided for a "guarantee" of payment of premiums. The appropriation was passed by the Act of July 1, 1922, 42 Stat. 771.

[39] The application form, issued April 8, 1918 (T. D. 26 W. R.), is set out in full in *Regulations and Procedure, United States Veterans' Bureau (Active and Obsolete Issues as of December 31, 1928), Part I,* pp. 10-11. Included in that application signed by the insured were the following two paragraphs:

"I hereby apply for the benefits of Article IV of the soldiers' and sailors' civil relief act, with reference to the above-described insurance on my life. This application is a consent to such modification of the terms of the original contract of insurance as are made necessary by the provisions of such article.

"I agree that the United States shall be *reimbursed* for any money advanced on account of unpaid premiums on the above policy (with interest at the rate of 5 percent per annum), out of the above policy, in the event of death or maturity, and out of any cash value, in the event such premiums are not paid within one year after the termination of the present war or the termination of any period of military service, whichever date is the earlier." [Emphasis added.]

without some ambiguity as to whether such reimbursement is to be derived solely from the proceeds of the policy and its cash surrender value, its language certainly precludes the contention that a gratuity rather than a debt was contemplated. The agreement to reimburse necessarily carries with it an acknowledgment of a future obligation or debt of the insured to the United States. Otherwise, there would be no occasion for repayment. It was to assure such repayment that the Act provided for a lien to the United States, and the form of the application clearly gives a consensual or contractual basis for that lien, which would not be available at common law.[40]

The Veterans Bureau subsequently reported to Congress that during the entire period the 1918 Act was in force, a total of 7,745 applications for insurance protection were received and approved. This represented life insurance in an amount in excess of $12,500,000 and a guaranty by the United States of yearly premiums of over $362,000. *Report of the United State Veterans' Bureau (1924),* p. 445. (Compare the experience under the 1940 Act; see fn. 5, p. 14, *supra.*) Of this amount, servicemen ultimately paid their insurers all but approximately $20,000. That is, roughly

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[40] Regulation No. 21, promulgated February 26, 1919, also underscores the expectation of reimbursement. Sec. 406 of the 1918 Act prohibited any loan, settlement, or payment of dividend on a protected policy which might prejudice the security of the lien of the United States. Regulation No. 21 permitted a loan on the policy "only when the cash surrender value of the policy * * * would at all times be sufficient to satisfy the claims of the United States, already accrued or which may accrue under the provisions of the Act, and in addition thereto be sufficient for the payment of the new loan * * * ." *Regulations and Procedure, United States Veterans' Bureau (Active and Obsolete Issues as of December 31, 1928), Part I,* p. 39.

95% of the premiums guaranteed were paid to the insurers directly by the insureds. Pursuant to its guaranty, the United States paid the small balance. Significantly, however, the Report informed Congress that some recoveries had in fact been made by the Bureau from the insureds to reimburse the Government for its outlay.[41] *Ibid.* Despite appellants' attempt to minimize this (Op. Br., p. 56), the inescapable fact is that reimbursement *was* sought and *was* obtained, and Congress *was* advised of it.

C. *The legislative history of the 1940 Act*

1. With the advent of our national defense program following the outbreak of World War II and the accompanying enlargement of our armed forces, the need for servicemen's civil relief again became imperative. Most of the benefits of the 1918 Act were revived in the summer of 1940. By amendments to the National Guard Bill [42] and the bill which became the Selective Training and Service Act of 1940,[43] the benefits were

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[41] "The precise extent of the Government's efforts to collect from insureds who permitted their insurance to lapse under conditions requiring the Government to pay to insurers the differences between the premiums with interest and the cash surrender value of the insurance is not known, but it is clear that, in the administration of the 1918 act, collections were effected in some cases. A list of at least 14 such cases is presently at hand. They reflect collections during the years 1923-24, and one such collection was made as late as October 8, 1925. For present purposes the amount of such collections and the extent to which efforts were made to effectuate them are matters of no importance. The significant thing is that they negative any idea or assertion that an administrative practice prevailed not to regard the insured as indebted to the United States." *Decisions of the Administrator of Veterans' Affairs, No. 742*, Supp. to Vol. 1, pp. 91, 98 (April 1, 1947).

[42] 54 Stat. 858, 860 (approved August 27, 1940).

[43] 54 Stat. 885, 895-6 (approved September 16, 1940).

extended to persons brought into the armed forces under those statutes. These amendments in effect incorporated the 1918 Act by reference. But they expressly excluded the insurance and tax provisions of the 1918 Act.[44] None of the congressional committee reports relating to these bills discuss the exclusionary features of these amendments.

In mid-August 1940, bills sponsored by the War Department which in substance proposed a detailed reenactment (as distinguished from incorporation by reference) of the 1918 law were introduced.[45] These bills contained an article relating to commercial life insurance protection different from the 1918 law only with reference to the method of administration (see *supra,* fn. 25, p. 28. In their reports on the bills, both the Senate and the House Committees on Military Affairs referred to the insurance article as a *guaranty* and used no language suggesting a gratuity.[46] Apart

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[44] Senator Overton, the sponsor of the amendments, explained that they were temporary in nature and that the War Department would soon draft a separate bill. 86 Cong. Rec. 10052, 10318, 10500.

[45] H.R. 10338, 76th Cong., 3d Sess., was introduced in the House by Representative May; Senator Overton introduced its counterpart, S. 4270, in the Senate. See 86 Cong. Rec. 10292; H. Rept. No. 3001, 76th Cong., 3d Sess., pp. 4-5.

[46] S. Rep. No. 2109, 76th Cong., 3d Sess., p. 3, explains with regard to the insurance provisions: "In the case of life-insurance policies, upon application by persons in the military services, the Administrator of Veterans' Affairs may *guarantee* payment of premiums in order to prevent lapsing or forfeiture of policies. Such persons may, within 1 year after leaving the military service, pay up premiums unpaid by them and resume payment of regular premiums. If they do not, the policy lapses and the cash surrender value accrues to the Government to the extent necessary to meet the cost of the premiums which it has *guaranteed.*" H. Rept. No. 3001, 76th Cong., 3d Sess., p. 4, comparing the proposed bill with the 1918 law, states as to the insurance provisions: "The only

from the urgent need for enactment of the bill, there was little discussion on the floor of the Senate relating to the insurance provision before the respective bills went to conference to settle disagreements. (See 86 Cong. Rec. 12837.)

In the House, however, a very significant discussion occurred. The debate there reveals that it was the Congressional purpose—certainly the House's understanding—that the insurance provision of the proposed bill would not result in the conferment of a gratuity, but rather, would provide a period of suspension as to the payment of insurance premiums; that, just as in the case of other civil obligations of the serviceman, it provided for a temporary delay and not for a wiping out of the obligations accruing; that the Government would simply guarantee payment of defaulted premiums during that period of suspension; and that if the Government had to pay the premiums by reason of its guaranty, the serviceman would later be obligated to reimburse it for such payment. This debate is of such importance that we have set it out at some length in Appendix E, *infra,* pp. 97-100.

This discussion, despite some minor inaccuracies as to the technical aspects of the bill, dissipates any idea that Congress intended that Government payments of defaulted premiums were not to be reimbursed. On the contrary, it shows clearly that the only time the specific question came up in Congress those managing the bill stated the purpose and expectation to be that the recipients of the insurance protection would, at

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change in this article relates to method of administration. In *guaranteeing* insurance premiums, certificates issued by the Veterans' Administration are used, instead of $100 bonds issued by the Treasury Department." [Emphasis added.]

some later period, have to repay the Government for its expenditures.

Thereafter, the House and Senate bills went to conference. There, the Senate bill (S. 4270) was adopted with minor changes not relevant here. Since the Senate bill did not differ from the House bill in its insurance provisions there was no occasion for the conference report (H. Rept. No. 3030, 76th Cong., 3d Sess.) to comment on this aspect. The bill was enacted October 17, 1940, 54 Stat. 1178.

2. Because the 1940 Act was amended before the termination of World War II, there was hardly occasion for a fixed administrative construction or practice to become established. But, as in the case of the 1918 Act, the application form and the regulations issued under the 1940 Act speak of a *guaranty* and look toward the insured's reimbursement of payments which the United States might make under that guaranty. *E. g.*, see 38 C. F. R. (1941 Supp.) 10.3300, 10.3309, 10.3310; R. 293.

Nevertheless, in an attempt to rest their case on a settled administrative construction of the 1940 Act, different from that given to the 1918 Act on the question of reimbursement (*supra,* pp. 34-35), appellants stress the ambiguous statements of certain VA officials (App. Op. Br. pp. 35-6). These officials, when informally answering inquiries made by persons in the insurance field, replied that the Act did not have provision for reimbursement from the insured. They did not say that the insured would not be liable for repayment, but only that the Act did not provide for repayment. Actually, there was no express provision. But whatever inferences were drawn from these enigmatic replies, it has long been settled that the United States can

neither be bound nor estopped by the mistaken representations of its officials. *Federal Crop Ins. Corp.* v. *Merrill,* 332 U.S. 380; *United States* v. *Stewart,* 311 U.S. 60, 70; *Whiteside* v. *United States,* 93 U.S. 247, 257; *Lee* v. *Munroe,* 7 Cranch 366. The same principle nullifies appellants' reliance (Br. p. 32) on the Breining statement. See *Decisions of the Administrator of Veterans' Affairs, No. 742* (April 1, 1947), Supp. to Vol. 1, p. 91; R. 62-94; *United States* v. *Nichols,* 105 F. Supp. 543, 550-1, 553 (N.D. Ia.). The first time the Veterans Administration took a formal position with reference to the 1940 Act on the point was in *Decisions of the Administrator, No. 513* (March 1, 1943), Vol. 1, p. 781, and it was there determined that the insured is obligated to reimburse the United States. That decision was carefully reexamined and reaffirmed in *Decision No. 742, supra;* R. 62-94. Those decisions express the formal and considered position of the administrative agency.

D. *The legislative history of the 1942 amendment*

It is a firmly established principle of statutory construction that "subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject." *Tiger* v. *Western Investment Co.,* 221 U. S. 286, 309; *Great Northern Ry. Co.* v. *United States,* 315 U. S. 262, 277; cf. *United States* v. *Hutcheson,* 312 U. S. 219; *Brown* v. *Duchesne,* 19 How. 183, 194. Accordingly, in seeking to determine the legislative purpose of the 1940 Act resort may properly be had not only to contemporaneous materials but to later legislative events as well.

Within a few months after enactment of the 1940 Act it became apparent that various of its provisions

needed amendment. A number of bills were introduced in the 77th Congress proposing changes with reference to different subjects covered by the Act.[47] A change in the insurance provisions was proposed by the Veterans Administration early in 1941. It transmitted to the Senate a proposed bill intended to clarify and liberalize Article IV of the 1940 Act and to eliminate much of the administrative work required under that law.[48] This proposal was later enacted into law. It specifically described the transaction as one of guaranty and it went on and made explicit what theretofore had been implicit, *viz.,* that the serviceman must reimburse his guarantor for its payment of his defaulted premiums (Sec. 406; now, 50 U.S.C. App. 546; *infra,* pp. 92-3; emphasis added):

> Payment of premiums and interest thereon * * * becoming due on a policy while protected under the provisions of this article *is guaranteed by the United States,* and if the amount so *guaranteed* is not paid to the insurer prior to the expiration of the period of insurance protection * * * the United States shall pay the insurer the difference between such amount and the cash surrender value. The amount paid by the United States to an insurer * * * *shall become a debt due to the United States by the insured* on whose account payment was made and, notwithstanding any other Act, *such amount may be collected either by de-*

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[47] See S. Rept. No. 1558, 77th Cong., 2d Sess., p. 1; H. Rept. No. 2198, 77th Cong., 2d Sess., pp. 1-2; 88 Cong. Rec. 5363.

[48] VA's letter of transmittal explaining the various proposed changes is set out in S. Rept. No. 716, 77th Cong., 1st Sess., pp. 4-6. The bill itself is set out at pp. 1-3 of the Report.

duction from any amount due said insured by the United States or as otherwise authorized by law.

The provisions of VA's proposed bill were substituted intact for those contained in a bill (S. 1372, 77th Cong., 1st Sess.) to amend Article IV which was then under consideration before the Senate Committee on Military Affairs. Recommending its enactment, the Senate Committee stated in its report:

> The proposed amendment has been drafted in accordance with the suggestions of the Veterans Administration *for the purpose of clarification* and will not effect any substantial change in the basic purpose of the bill * * *.
>
> The purpose of the proposed amendment is to substitute a more workable law and to avoid much of the administrative work required under Article IV as now enacted. It will *liberalize* the existing law * * *.[49]

The bill was promptly passed by the Senate and then was referred to the House Committee on Military Affairs. Meanwhile, a subcommittee of the latter had been appointed to study the numerous proposals to amend other aspects of the 1940 Act. As a result of its study, the subcommittee made a recommendation to the full committee in the form of a bill (H. R. 7029, and see H. Rept. No. 2198, 77th Cong., 2d Sess., pp. 1-2). This bill, too, contained a section stating that the payment by the United States of defaulted premiums shall constitute a debt due from the serviceman to the United

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[49] S. Rept. No. 716, 77th Cong., 1st Sess., p. 3. [Emphasis added.]

States.[50] Following hearings on H. R. 7029, the House Committee revised that bill and caused to be introduced H. R. 7164, 77th Cong., 2d Sess. The latter bill omitted the section describing the transaction as a guaranty and the resulting accrual of a debt. The Committee Report recommending its passage, however, has no comment on the omission. H. Rept. No. 2198, 77th Cong., 2d Sess. And, although that Report (*id.*, p. 6) and the sponsors of the bill on the floor of the House (88 Cong. Rec. 5364-5366) freely refer to the transaction as a "guaranty", no reference was made to whether the serviceman is obligated to repay the Government for its payment of defaulted premiums.[51]

The House passed H.R. 7164 (88 Cong. Rec. 5373) and sent it to the Senate. There, by amendment on the floor, the Senate struck all of the insurance provisions from the House bill and substituted the provisions of the bill (S. 1372, *supra*) previously proposed by VA and enacted by the Senate. 88 Cong. Rec. 6705-6707.[52] Following this amendment and passage by the Senate, the bill was sent to conference. There, the Senate's version (which, in turn, was VA's) of the amended insurance provisions was retained, some minor changes

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[50] Sec. 409 of H.R. 7029. The bill is set out in full in *Hearings before the Committee on Military Affairs, H. Rep., 77th Cong., 2d Sess., on H.R. 7029*, pp. 1-7. The language of Sec. 409 of this bill is identical with the part of Sec. 406 of S. 1372 quoted above, pp. 40-1.

[51] Cf. *Decisions of the Administrator of Veterans' Affairs, No. 742,* Supp. to Vol. 1, at pp. 102-103.

[52] Senator Johnson (Colo.), the sponsor of the amendment, explained on the floor that "the purpose of the bill is *to make available additional and further relief and benefits* to persons in the military and naval forces, *and to clarify the original act*, which is known as the act of 1940. Most of the amendments are technical in nature. * * *." 86 Cong. Rec. 6707 (emphasis added).

being made. See H. Rept. No. 2481, 77th Cong., 2d Sess., p. 6 (Conference Report).[53] The bill was thereafter enacted and became law on October 6, 1942 (56 Stat. 769, 773).

Apart from the clarifying language describing the transaction as one of guaranty by the United States, with the servicemen being liable for reimbursement, among the liberalizing changes effected by the 1942 amendment were 1) the period of protection against lapse of policies was extended from one to two years following termination of military service; 2) the face value of policies protected was raised from 5 to 10 thousand dollars; 3) a beneficiary was given the right to apply for the Act's protection in case the insured was outside continental United States; and 4) the exclusion from the protection of the 1940 Act of policies as to which there was an outstanding loan equal to at least 50% of the cash surrender value of the policy was dropped. It also provided that the provisions of the 1940 Act shall remain in force with respect to applications for protection executed prior to enactment of the amendment. (The 1940 Act had set up transactions essentially contractual in nature and presumably Congress had no intention to alter them.) The amendment provided further that insur-

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[53] In reporting and explaining to the House the action of the Conference Committee, Representative Sparkman, a member of that Committee, stated with regard to the payment of defaulted premiums by the United States: " * * * Under the House bill nothing was said about these amounts being claims against the person in the armed forces after he got out of the service. The Senate [bill] provides that they shall be a claim against him and shall be collected against any amounts that may become due him by the United States. The House accepted the Senate provision" (88 Cong. Rec. 7541).

ers, whose policies were protected under the 1940 Act, could choose to settle their accounts with the United States under the much simpler method of the 1942 Amendment.

The amendment did not, as appellants argue (Op. Br. p. 22 *et seq.*), work a substantial change in the whole scheme of insurance protection. As we have just noted (*supra,* p. 41), the Senate Committee declared that the amendment would *not* effect any substantial change in the basic purpose of the bill. That purpose, as the history of the 1918 Act demonstrates, was to create a transaction of guaranty. Nor did the 1942 Amendment result in any increase in appellants' liability. They were obligated under the 1940 Act to pay their defaulted premiums plus interest (see *infra,* p. 46 *et seq.*). That obligation was not modified or increased. The additional year's protection of their policy was one of the liberalizing features of the 1942 law as construed by VA; appellants were given full notice and could have discontinued that protection at any time had they wished to do so (R. 288).

III

The Insured Is Obligated to Reimburse the United States for Its Payment of Defaulted Premiums on His Behalf

From the foregoing review of the legislative history and of the language of Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940, these conclusions emerge: First, that the general purpose of the statute was to provide a temporary suspension of the enforcement of civil liabilities of servicemen during their period of military service, not a gratuitous dis-

charge of those liabilities.[54] Second, that one particular purpose of the insurance Article was to create a legally enforcible debt due and owing by the insured to his insurer for premiums falling due during the period his policy was to be protected under the Act. Third, that the transaction envisaged by the Act was one of guaranty, *viz.,* the United States undertook to pay the insured's debt if he failed to do so within the specified period. And fourth, that the Congress did not thereby intend to confer a gratuity upon the insured to the extent of any payments made by the United States pursuant to the guaranty, but on the contrary, Congress contemplated that the insured would reimburse the United States, and to that end even wrote into the Act security devices (such as the lien provision of Sec. 408) to assist in obtaining prompt reimbursement. In this point we will show that these purposes were in fact accomplished by the terms of the Act; that the insured is subject to a primary indebtedness for the defaulted premiums; and that the United States, as his guarantor who paid the debt on his behalf, is entitled to full reimbursement.

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[54] This purpose of providing a suspension of remedies for a *temporary* period is stated in the first section of the Act (Sec. 100; *infra*, p. 81). In the words of Judge Lemmon: "Coming as they do at the very threshold of the statute, these Congressional declarations tincture the entire enactment. Every article, every section, every paragraph, every sentence is tinged with this 'temporary suspension' hue—unless a contrary legislative intent is plainly shown. No such contrary intent has been even intimated in any of the sections pertinent to the present lawsuit" (R. 110-111). The Act does not provide a discharge of liabilities. *Kerrin* v. *Kerrin,* 97 Cal. App. 2d 913, 218 P. 2d 1004.

A. *The insured is subject to a primary indebtedness for the defaulted premiums*

When an insured expressly requests an insurer to afford coverage during a specified period and the insurer pursuant to the request gives coverage, whether on the basis of the insured's personal credit or the added inducement of a guaranty by a third party, the insured is obligated to pay the insurer for the coverage so extended. In short, he has purchased insurance and must pay for it. Cf. *Commercial Mutual Marine Ins. Co.* v. *Union Mutual Ins. Co.,* 19 How. 318, 323; *Tarleton* v. *DeVeuve,* 113 F. 2d 290, 295-6 (C.A. 9), certiorari denied, 312 U.S. 691. There is, therefore, no merit to appellants' argument (Op. Br. pp. 39-41) that, even though they applied to their insurer and received continued insurance coverage, they were not obligated to pay premiums to that insurer. See *United States* v. *Nichols,* 105 F. Supp. 543, 547 (N. D. Ia.), app. dism'd, 202 F. 2d 958; *Decisions of the Administrator of* VA, No. 742, Vol. 1, Supp. 1, at pp. 103-4 (R. 85-8). Article IV of the 1918 Act was specifically designed to create a legally enforcible obligation owing from the insured for premiums becoming due during his military service. As we have seen (*supra,* pp. 23-24), the whole basis of the objections advanced by the insurance industry against the bill orginally introduced was that, under its terms, the insured had an option to pay or not to pay his premiums; that, since he had not requested renewal of his insurance contract, it was feared that the insurer would be unable to enforce payment of premiums at the termination of his military service. The optional nature of the

obligation was removed. As revised and passed, the Act contemplated—indeed, provided for—a binding primary obligation on the part of the insured to pay the premiums to the insurer, for it extended protection only when the insured expressly requested his insurer (through an application submitted *to the insurer*) to continue insurance coverage despite current default of premiums (the ultimate payment of which the Government guaranteed), and the insurer (by forwarding the application to the Government) agreed to do so. Sec. 401 (1), *infra,* p. 82.

The Government's part in the transaction was that of a guarantor. (See *infra,* p. 48 *et seq.*) The concept of guaranty necessarily implies the existence of a primary obligation. By definition a guaranty is a promise by one party to pay the debt of another (see fn. 55, *infra,* p. 48).

Further recognition in the Act of the primary nature of the obligation of the insured is the provision in Sec. 409, *infra,* p. 86-7, that, in the event of the death of the insured while the protected policy is in force, "the amount of any unpaid premiums, with interest at the rate provided in the policy for policy loans, shall be deducted from the proceeds of the policy" in payment to the insurer for such unpaid premiums. This provision directing self-payment by the insurer unquestionably infers an underlying debt of the insured. See also Sec. 410 ("If the insured does not within one year after the termination of his period of military service *pay to the insurer* all past due premiums with interest thereon * * * the policy shall * * * lapse * * *.") [Emphasis added.]

Moreover, the use of such phrases as "*defaulted*

premiums" (Sec. 408), "*unpaid* premiums" (Sec. 409), "*past due* premiums" (Sec. 410), all indicate an obligation to pay. And this is underscored by the requirement that the premiums must be paid *with interest,* for the word "interest" imports an amount which one has contracted to pay for the use or forbearance of money; it normally does not apply to moneys which are payable at one's discretion (*Equitable Society* v. *Commissioner,* 321 U.S. 560, 564; *Deputy* v. *DuPont,* 308 U.S. 488, 498).

It is to be noted, finally, that nowhere in the Act is there any suggestion that this primary obligation of the insured is for anything less than the entire amount of the defaulted premiums plus interest at the policy loan rate.

B. *Having paid the defaulted premiums as a guarantor, the United States is entitled to reimbursement from the principal debtor*

The legislative history and the terms of the statute clearly demonstrate that the Act set up a transaction of guaranty.[55] Although that word is not used in

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[55] A guaranty is a promise to pay if the one primarily liable for the debt does not. 24 Am. Jur. 873-874; 4 *Williston on Contracts (Rev. Ed.)*, p. 3484. Being a collateral undertaking of another person, a guaranty imports the existence of two independent obligations: that of the principal debtor and that of the guarantor. 24 Am. Jur. 875-876. It differs from surety in that the surety is party to the original obligation, may be sued as a primary obligor jointly with the principal, and is unconditionally bound; in guaranty, the guarantor's liability is secondary and is conditioned upon default of the principal debtor and notice of such default. 24 Am. Jur. 879. Guaranty differs from indemnity in that the indemnitor's liability is primary and, in the normal situation, there is no privity or obligation between the parties to the indemnity contract and the third person (principal debtor) who causes the loss; in guaranty, there must be an obligation or privity between the creditor and the prin-

Article IV,[56] we have seen (*supra,* p. 24 *et seq.*) that the word "guaranty" was used repeatedly to describe and explain the transaction in the committee reports, in the legislative hearings, in the debates on the floor of the House and Senate, in the Regulations implementing the Act, in its administrative construction, and even in the title given to Article IV when it was proposed as a separate bill. This, as well as the entire context of the Article, permit no conclusion other than that the transaction involved was intended to be one of guaranty. The word has a definite and well known legal significance at common law. Congress is presumed to use terms in their recognized meaning at law. *Case* v. *Los Angeles Lumber Co.,* 308 U.S. 107, 115; *McNally* v. *Hill,* 293 U.S. 131, 136. Similarly, when Congress utilizes a transaction familiar to the common law, it must be presumed that Congress meant to ascribe to the transaction the same legal characteristics and the same consequences as would normally flow from such a transaction at common law. See, *e.g.,* guaranty—38 Ops. Atty.

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cipal debtor. See *Howell* v. *Commissioner,* 69 F. 2d 447, 448 (C.A. 8) certiorari denied, 292 U. S. 654; *United States* v. *Nichols, supra,* 105 F. Supp. at 556; 24 Am. Jur. 882-883. Under the Civil Relief Act the basic requisites of the formation of a contract of guaranty were present. Thus there was offer and acceptance (submission of applications to the VA and latter's approval); consideration (extension of insurance and deferment of lapsing the policy for failure to pay premiums currently); an independent promise or guaranty the U. S. undertook to pay premiums if the insured did not); there was provision for the creditor-insurer to give notice of default by the principal debtor-insured (through the monthly reports and final accounting), etc.

[56] Just as the word "contract" is not needed to constitute a contract, it is well settled that the presence or absence of the label "guaranty" is not decisive in determining whether a particular transaction is one of guaranty; instead, the transaction must be viewed in the light of its incidents, the attendant circumstances and the intentions of the parties. 24 Am. Jur. 876-877.

Gen. 75; 38 *id.* 319; insurance contract—*Ferguson* v. *Union National Bank,* 126 F. 2d 753, 759 (C.A. 4); *Fleetwood Acres* v. *FHA,* 171 F. 2d 440, 442 (C.A. 2); note—*United States* v. *Hansett,* 120 F. 2d 121, 122 (C.A. 2); mortgage—*HOLC* v. *Wilkes,* 130 Fla. 492, 178 So. 161.

It is, of course, an elementary rule of guaranty that where the guarantor, pursuant to his undertaking, has paid the indebtedness, the principal debtor is obligated to indemnify and reimburse the guarantor. The debtor's obligation to pay the debt is not extinguished by the guarantor's payment. Even in the absence of any express contract, he is impliedly bound to reimburse his guarantor. *Fidelity & Deposit Co.* v. *Hobbs,* 144 F. 2d 5, 8 (C.A. 10); *Joe Balestrieri & Co.* v. *Commissioner,* 177 F. 2d 867, 872 (C.A. 9); *Scott* v. *Norton Hardware Co.,* 54 F. 2d 1047, 1050 (C.A. 4); and see, *Howell* v. *Commissioner,* 69 F. 2d 447, 450 (C.A. 8), certiorari denied, 292 U.S. 654; 4 *Williston on Contracts (Rev. Ed.),* p. 3635; 24 Am. Jur. 956. Not only may the claim of the guarantor be based upon this implied contract of reimbursement, but it may also be based upon subrogation to the creditor's rights against the insured (the principal debtor). *Alexander* v. *Young,* 65 F. 2d 752, 756-757 (C.A. 10); *Scott* v. *Norton Hardware Co., supra,* 54 F. 2d at 1051; *Howell* v. *Commissioner, supra,* 69 F. 2d at 451; 24 Am. Jur. 955-956.[57]

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[57] Additionally, since the insured, through his application, requested the United States to pay his premiums, recovery may be had on the basis of an implied assumpsit. *Metropolitan R'd* v. *Dist. of Columbia,* 132 U.S. 1, 12-13; 4 Am. Jur. p. 507.

C. *The remedies given to the United States by the Act supplement the common law remedy of reimbursement*

Appellants, and others who have sought to escape payment of their defaulted premiums, argue that even assuming that a transaction of guaranty was intended, the Act confers its own remedies upon the United States which replace the established common law remedy of reimbursement. In that connection, they refer to Section 408 which provides for the delivery by the United States of certificates to the insurer as security for the unpaid premiums with interest and then goes on to say that, "To indemnify it against loss the United States shall have a first lien upon any policy receiving the benefits of this article," and further, that no loan, settlement, or dividend may be made or paid by the insurer "which may prejudice the security of such lien"; to Section 409, which provides that in the event of the insured's death, the defaulted premiums, with interest, shall be deducted from the proceeds of the policy and credited to the United States in the monthly report; and to Section 411, which provides that upon the final settlement between the insurer and the United States, the United States shall be given credit for the cash surrender value of the lapsed policy (to the extent of the unpaid premiums with interest).

This argument has been comprehensively examined and squarely rejected in *United States* v. *Nichols, supra,* and in *Decisions of the Administrator of VA, No. 742* (R. 62-94). See also *Morton* v. *United States,* 113 F. Supp. 496 (E.D.N.Y.); *Decisions of the Administrator of VA, No. 513* (March 1, 1943), Vol. 1, p. 781.

In the first place, each of these provisions is consistent only with a Congressional purpose that the burden of the premiums shall fall where in equity and good conscience, and under traditional legal principles, it belongs—upon the insured. As stated in the *Nichols* case, *supra* (105 F. Supp. at 547), they "tend to indicate that there was no intent on the part of Congress to provide gratuitous insurance." They are in the nature of provisional remedies obviously intended to safeguard the reimbursement right of the United States; they assure to the United States that funds owed by the insurer to the insured will not be paid or dissipated unless the claims of the United States against the insured are first satisfied; they provide "a remedy about which there might otherwise be some difficulty with respect to procedure or with respect to exemption statutes" (*ibid.*).[58]

Second, the lien provision necessarily imports a debt of the insured which has existence independent of the lien, for a lien is simply a security device; title to the property which is subject to the lien is not thereby vested in the lienor; a lien is only an encumbrance or a charge upon property for the payment of a debt. *Tobin* v. *Insurance Agency Co.,* 80 F. 2d 241, 243 (C.A. 8); *United States* v. *1364.76875 Wine Gallons*, 60 F. Supp. 389, 392 (E.D. Mo.); 33 Am. Jur. p. 419. And the underlying debt which the lien secures must be for the entire amount of the insured's

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[58] Submission of the application for protection by the insured and the insurer constituted their "consent to such modification of the terms of the original contract of insurance as are made necessary by the provisions of this article" (Sec. 401 of the 1940 Act; *infra*, p. 82-3).

obligation to the insurance company, which the United States undertook to pay if the insured did not. For the Section speaks of indemnifying the United States "against loss" *without qualification*. There is nothing in the lien section to suggest that the Government was to be indemnified merely *pro tanto* or to the extent of the cash surrender value only. Rather, the possible loss being secured against must relate to the subject of the sentence which immediately precedes the indemnity sentence in the same Section, *viz.,* the certificates delivered by the United States to the insurer as security "for payment of the defaulted premiums with interest," which represents the entire amount the United States had under risk of loss.

Third, to limit the reimbursement right of the United States solely to the statute's provisional remedies (of lien on the proceeds of the policy, or of credit for the cash surrender value, or of credit for premiums and interest on death) would be inequitable both from the viewpoint of the United States and from the viewpoint of servicemen. Instead of being uniform as to all servicemen, the reach of the remedy would vary from policy to policy. The widow, beneficiary, or estate of the serviceman who makes the ultimate sacrifice in line of duty would be liable, through the lien on the proceeds of the policy, for full payment of the unpaid premiums. On the other hand, those servicemen who, like appellee, survive would only be liable to the extent of the available cash surrender value on their policy, and of course that amount might be different in each case, some perhaps with no cash surrender value at all. And, whenever the cash surrender value is not

sufficient to meet the premium obligation, the United States would have no recourse for the deficiency.[59]

But the manifest purpose of the statutory remedies was to provide security, to the extent available, against *any* loss by the Government. To confine the Government's rights to these remedies would invert that purpose to an intention to assure some loss because it would deprive the United States of the right to seek the deficiency. The admonition of the Supreme Court in *Shriver* v. *Woodbine Bank,* 285 U. S. 467, 478-479, is pertinent: "Here, the remedy provided [by the statute] is a summary and only partially effective supplement or alternative to that which the common law affords for enforcing the obligation

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[59] "To hold that the insured is not indebted to the Government in such circumstances would produce results so inequitable and falling so unevenly upon those protected under the 1940 act that the intelligence and sense of fairness of Congress should not be impugned by ascribing to it such an intent unless no other conclusion can be drawn from the language of the act itself. For example, it would be possible, in that event, for an insured, whose policy had no cash surrender value or only such as accrued at no cost to him, to allow his insurance to lapse upon termination of the act's protection, thereupon pay nothing at all, and yet be free of all obligations. On the other hand, the act specifically requires another, who loses his life in service, to pay the premiums by having them deducted from the proceeds of the insurance. Still another who at the time of seeking the act's protection was insured under a policy possessing a cash surrender value—substantial in amount but not exceeding the unpaid premium—must lose even that which he had before entering service unless he pay the premiums. He cannot avoid such loss by having the Government step in and pay the insurer, and hence he cannot even delay the payment beyond the time provided. Finally, one who desires to continue the insurance in force after the act's protection ceases must pay the back premiums according to the terms of his policy, and this is so no matter what the cash surrender value may be." *Decisions of the Administrator No. 742, supra,* at pages 104-5 (R. 86-7). See also, *Morton* v. *United States,* 113 F. Supp. 496, 500.

to pay a sum certain * * *. The very fact that the remedy is on its face inadequate to compel full performance of the obligation declared, is persuasive that it was not intended to be exclusive of applicable common law remedies, by which complete performance might be secured." The Act's summary remedies are cumulative, not exclusive; they involve no inconsistency with the common law remedy of reimbursement, and it is a settled canon of statutory construction that a long established common law remedy is ordinarily not regarded as taken away by a statute except by express enactment or necessary implication, neither of which is present here. *Ibid.; United States* v. *Chamberlin,* 219 U. S. 250; *United States* v. *Stevenson,* 215 U. S. 190, 197-199; *King* v. *Pomeroy,* 121 Fed. 287, 290-293 (C. A. 8); and see *Perego* v. *Dodge,* 163 U. S. 160, 167-168.

An additional factor indicating that Congress intended that the United States should be reimbursed in full under the 1940 Act is stressed in the *Nichols* case, 105 F. Supp. at 558. The court noted that if those in the position of the present appellee were to escape reimbursement, the result would be that a group of servicemen would have been furnished with free insurance protection by the United States with commercial insurance companies. Yet, just nine days before passage of the Civil Relief Act of 1940, Congress had passed the National Service Life Insurance Act. Under that Act, servicemen had to pay for their insurance protection. It is hardly credible that Congress, after passing an act requiring servicemen to pay for government insurance, "would nine days later turn around and provide a certain group of service-

men with what in substance would be free insurance protection with commercial insurance companies, with higher premium rates." [60]

Finally, and this cannot be overlooked, Congress was aware that the 1918 Act had been construed administratively as a guaranty and as requiring the insured to make full reimbursement, for, in its final report to Congress relating to the 1918 Act, the Veterans Bureau had advised that some collections had been recovered as a reimbursement for payments under the guaranty (*supra*, p. 34-5). When Congress is aware of the manner in which a statute has been construed by the agency or officials charged with the duty of carrying its provisions into effect, and then reenacts that statute without evidencing any disapproval of that construction and without altering the relevant provisions, it must be presumed that the construction met with the approval of Congress. *United States* v. *G. Falk & Brother,* 204 U. S. 143, 150-152; *United States* v. *Philbrick,* 120 U. S. 52, 58-59. It is assumed that Congress would have effected explicit changes if it disagreed with that construction. *National Lead Co.* v. *United States,* 252 U. S. 140, 145-146; *United States* v. *Bailey,* 9 Pet. 238, 255-256; cf. *United States* v. *Cerecedo Hermanos,* 209 U. S. 337, 339; *United States* v. *Dakota-Montana Oil Co.,* 288 U. S. 459, 466; *Missouri* v. *Ross,* 299 U. S. 72, 75; *Commissioner* v. *Flowers,* 326 U. S. 465, 469. It follows that the

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[60] Premiums were also required to be paid on insurance issued by the Government under the War Risk Insurance Act during the first World War. See also *Decisions of the Administrator of VA, No. 742,* Vol. 1, Supp. 1, at pp. 105-106 (R. 88-9).

Agency's construction of the 1918 Act received legislative acquiescence.[61]

IV

No Express Statutory Authority Is Necessary for the United States to Recover Reimbursement from Appellants

The underlying basis for most of appellants' argument in their Opening Brief (*e.g.*, pp. 11, 21, 27) is their contention that they are not liable for reimbursement because there is no express language to that effect in the 1940 Act, and that Congress failed to provide a specific plan for fixing the amount of recovery from the insureds thus indicating a Congressional intent that payments by the United States be a bounty or gratuity. The contention rests primarily on two cases: *United States* v. *Hendler,* 123 F. Supp. 383 (D. Colo.) and *Hormel* v. *United States,* 123 F. Supp. 806 (S.D. N.Y.).[62] *Hendler* was an action by the United States to obtain reimbursement for its payment of the insured's defaulted premiums under the 1940 Act. Since the *Hendler* decision rests solely on *United States* v. *Gilman,* 347 U.S. 507, which appellants rely on here,

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[61] Further evidence that the Congress considered the 1940 Act, as originally enacted, as imposing a debt or obligation upon the insured to reimburse the Government for any amount expended in his behalf appears in the Act of April 3, 1948, 62 Stat. 160, amending Sec. 406 of the 1942 Amendment by adding these words (now in 50 U.S.C. App. 546):

> Any money received as repayment of *debts* incurred under this article [IV], *as originally enacted* and as amended, shall be credited to the appropriation for the payment of claims under this article. [Emphasis added.]

[62] *Hendler* is now pending on appeal in the Tenth Circuit; a notice of appeal to the Second Circuit has been filed in *Hormel.*

we will discuss the inapplicability of *Gilman.* We will then discuss *Hormel,* the facts and issues of which are parallel to those in the instant case.

A. *The Gilman decision is not applicable to the present case*

In the *Hendler* case the district judge stated that, "upon moral grounds I am in full accord with the result of the decision" in *United States* v. *Nichols,* 105 F. Supp. 543 (N.D. Ia.) where, in an action for reimbursement, it was held that the United States is entitled to recovery under common law principles. The judge ruled, however, that the theory of the *Nichols* case had been rendered unavailable by the later decision in *Gilman,* a case in which no question whatever relating to the Civil Relief Acts was involved. Relying on *Gilman,* the *Hendler* judge ruled that reimbursement must be denied because Congress "had expressed no 'position' concerning the personal liability of a soldier for indemnification or reimbursement" (123 F. Supp. at 384). This holding, which appellants advance here, disregards the long established rule that no specific statutory authorization is required for the judicial enforcement of the contractual or other property rights of the United States. It substantially misconceives and misapplies the *Gilman* decision. And, it fails to perceive that the provisional remedies for reimbursement set forth in the Act demonstrate a Congressional "position" to require reimbursement.

1. The Supreme Court held, as early as 1818, that no express statutory authority is necessary to enable the United States to recover for a breach of contract, since "It would be strange to deny to them [*i. e.,* the

United States] a right which is secured to every citizen." *Dugan* v. *United States,* 3 Wheat. 172, 181. In *Cotton* v. *United States,* 11 How. 229, 231-232, where a statute provided a criminal penalty for cutting timber on public lands but prescribed no civil remedy, the Court, affirming the right of the United States to bring an action of trespass, declared, "It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they [*i. e.,* the United States] were not entitled to the same remedies for their protection. * * * [A]s a corporation or body politic they may bring suits to enforce their contracts and protect their property." See also, *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537, 550; *United States* v. *Standard Oil Co., of California,* 332 U. S. 301, 315, fn. 22. This rule applies not only in actions on express contracts and in tort but also in actions based on various quasi-contractual obligations or contracts implied in law. Examples, among many, include the right of the United States to recover money paid by it under a mistake of law or fact (*e. g., Wisconsin C. R. R. Co.,* v. *United States,* 164 U. S. 190); the right of the United States as drawee of a check to recover money paid on a forged endorsement (*e. g., Clearfield Trust Co.,* v. *United States,* 318 U. S. 363; *United States* v. *National Exchange Bank,* 214 U. S. 302); and the right of the United States to set aside transactions for fraud (*United States* v. *San Jacinto Tin Co.,* 125 U. S. 273, 279-285). The right to maintain suit to establish and safeguard the Government's contract and property interests is an inherent power of the United States. It "is independent of statute" (*United*

States v. *Bank of Metropolis,* 15 Pet. 377, 401; *United States* v. *California,* 332 U. S. 19, 26-27).

2. The decision in *United States* v. *Gilman, supra,* certainly cannot be read as discarding this basic precept expounded more than a hundred years ago and emphatically reiterated through those years in a wealth of Supreme Court cases. In the *Gilman* case the Court was presented with a problem raising policy questions with unique implications under a particular statute whose purpose, history, and provisions are entirely unlike the one at bar. The question there presented was whether the United States, having been held liable for the negligence of its employee in a suit under the Federal Tort Claims Act (28 U.S.C. 1346 (b), 2671 *et seq.*), could recover indemnity from that employee. The Court placed great stress on the disciplinary effect of such a suit upon those who make government service their career.[63] It pointed to the potential heavy financial burden involved and underscored the probable effects on morale, on seniority, and on the promotion and demotion possibilities of the employee. 347 U.S. at 509-510. The absence of an expression of Congressional position on these delicate, complex, and wholly internal policy questions was mentioned as an added reason for denying recovery.[64] The

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[63] "When the United States sues an employee and takes him to court, it lays the heavy hand of discipline on him, as onerous to the employee perhaps as any measure the employer might take, except discharge itself." 347 U.S. at 510.

[64] The Court also pointed to the Tort Claims Act provision making a judgment against the United States a bar to an action against the employee (28 U.S.C. 2676) and to certain explanatory statements at Congressional hearings, which, if anything, indicated a Congressional position opposed to indemnity. 347 U.S. at 511, fn. 2.

Court, however, distinguished cases involving "an established type of liability" (*id.* at 509) as not requiring specific statutory sanction.

Here, we are dealing with such an established type of liability, *viz.*, the debtor's obligation to reimburse his guarantor. Moreover, the unique considerations involved in *Gilman* militating against recovery certainly are not involved here. In *Gilman,* the Court was construing a statute whose overriding purpose was to impose liability upon the United States for torts committed by its employees while acting in furtherance of Government business, a liability which every employer has.[65] The broad purpose of the Civil Relief Act is not to assume the obligations of servicemen or to effect the discharge of their debts, but merely to accomplish a temporary postponement of those obligations, none of which were incurred by reason of government employment. Appellants are not government employees whose activity on behalf of the United States and in furtherance of its affairs subjected them to an obligation for which the United States, under moral or legal grounds, is vicariously liable. To the contrary, appellants' obligation for defaulted insurance premiums arose out of their private affairs, stems from contracts they executed for their personal protection before they joined the armed forces, contracts which were continued in force at their own election, essentially for their own benefit, and which obligated them for a liquidated amount known to them at all times and presumably fitted to their civilian ability to

[65] The liability of the United States under the Tort Claims Act is conditioned upon the employee's tort being committed "while acting within the scope of his office or employment" (28 U.S.C. 1346 (b)), and is subject to numerous exceptions (*id.,* 2674, 2680).

pay. Enforcement of that obligation involves no problem of discipline or morale or internal federal relationships.[66] Thus, the crucial factors in *Gilman* clearly are not present here.

3. But even if the *Gilman* decision has application beyond the Federal Tort Claims Act, the requirement it suggested—that Congress must indicate its position on policy—is met here. Our discussion of the Civil Relief Acts of 1918 and 1940, particularly of the provisional remedies afforded the United States under Article IV, discloses a Congressional position that the insured is not to receive insurance gratuitously and that the United States should be able to recover the defaulted premiums paid on his behalf. The lien and cash surrender value provisions of the Act reach funds owed by the insurer to the insured, and divert those funds to the United States unquestionably for the single reason of making the United States whole. At times these provisions may result in full reimbursement; at times they will not. But certainly, in the face of these provisions, it cannot be said that Congress has not taken a position on the question of indemnification or reimbursement. *The funds reached are those belonging to the insured.* By the clearest implication, these provisions show that Congress intended that the insured reimburse the United States; "what is clearly implied is as much a part of a law as what is expressed." *Luria* v. *United States,* 231 U.S. 9, 24; *South Carolina* v. *United States,* 199 U.S. 437, 451; *McHenry* v. *Alford,* 168 U.S. 651, 672.

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[66] Indeed, to give appellants "a free ride" in their private insurance (see R. 110) would surely have a deleterious effect on their fellow servicemen because of the resultant inequities. See *supra,* p. 54.

B. *The Hormel decision is erroneous*

The theory of the *Hormel* decision [66a] is essentially the same as the *Hendler* decision, being based on the supposed failure of Congress to take a position as to the amount which the insured must pay as reimbursement. The *Gilman* case, however, was not mentioned. In *Hormel,* the district judge stated that the Government's claim must be based upon a guarantor's implied right of reimbursement; that the guarantor may recover only the amount which he is required to pay under the guaranty; but that under the 1940 Act there is no way of determining how much of the total paid by the Government to each insurer is attributable to a particular insured (123 F. Supp. at 812). He noted that "there could be a disparity" between the amounts paid by the Government to the insurers and the amounts which the Government was seeking to collect from the insureds through reimbursement, with a resultant "profit" to the Government. Through a series of hypotheticals he suggested that the disparity resulted from the fact that (a) the insured was liable to the insurer for the defaulted premiums plus interest at the policy loan rate, usually 5% or 6%, but the Government was liable to the insurer for the premiums plus interest fixed by the Secretary of the Treasury

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[66a] In *Hormel*, plaintiffs sued to recover special dividends on their [Government] National Service Life Insurance policies. The United States defended by contending it was entitled to setoff against the dividends due the plaintiffs the sums owed by them for the defaulted premiums on their private policies which the United States had paid on their behalf pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940.

at only 3%;[67] and (b) the accounts between the various insurers and the United States were to be settled on a lump-sum-basis rather than on a per-policy-basis, making it difficult to trace the exact share attributable to a particular policy. He concluded that the failure of Congress to set out in the Act a specific plan for computing the amount owed by a particular insured "demonstrates that Congress did not intend that there should be any recovery from the insured" (123 F. Supp. 812). Appellants rest their appeal almost wholly on the *Hormel* decision (Op. Br. p. 11).

There are several reasons why the *Hormel* decision is wrong. In the first place, the Act does indicate the amount for which the insured is liable; it clearly contemplates that the insured is to pay the defaulted premiums plus interest at the policy loan rate. Thus, the amount specified for deduction from benefits payable in the event of the insured's death while the policy was protected (which amount was to be credited to the United States) is "any unpaid premiums, with interest at the rate provided for in the policy for policy loans" (Sec. 409); and on settlement, the cash surrender value not to exceed unpaid premiums with interest at the policy loan rate were to be credited to the United States (Sec. 411). This is the same amount which had to be paid to the insurer if the insured de-

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[67] The certificates delivered by the Government to the insurer on the basis of the "monthly differences" as security for the defaulted premiums were to bear interest at a rate to be prescribed by the Secretary of the Treasury (see *infra*, p. 86). It so happened that the rate was fixed at 3 percent, 38 C.F.R. (1941 Supp.) 10.3312, but Congress could not possibly have known at the time of passage of the Act the rate which the Secretary would fix and thus could not anticipate any disparity. This would seem to undermine the rationale of the *Hormel* opinion.

sired to keep the policy in force following the period of protection (Sec. 410).

Certainly the plan provided by the 1940 Act (Section 406) in the form of Monthly Difference Reports on which the name of each policyholder, the amount of any premiums not paid by him when due, and the amount of any premiums paid in his behalf (even those deducted from the proceeds on maturity, as provided in Section 410) would enable any layman to determine the amount payable by the Government in a particular case. In this connection, it will be noted that Section 411 requires that in arriving at the balance due by the Government on final settlement the records on each "case" be examined so that no policyholder would be charged "a greater amount * * * than the total of the unpaid premiums with interest" against the cash surrender value of *his* policy. Thus, so far as an individual policyholder is concerned, the fact that any portion of his unpaid premiums was secured and represented by outstanding certificates issued on the basis of Monthly Difference Reports which also included amounts due by others is of no consequence whatever. In *Hormel,* the judge apparently did not realize that so far as a matured policy was concerned (Section 410), the effect of payment of the premiums and interest from the policy proceeds eliminated that policy from the settlement procedure of Section 411 and in no way could affect the amount required to be disbursed on account of any other policyholder.

Second, it is by no means certain that any disparity adversely affecting the insured would have resulted from the payment by the Government of the 3% interest on certificates. For, the Government had to

pay this interest from the date of issuance of the certificates until one year after the Act ceased to be in effect (Secs. 407, 411, 604); the insured was charged with the policy loan rate on defaulted premiums, 5 or 6%, but *for the shorter period* ending not later than one year after separation from service (or two years under the 1942 Amendment). Thus, the aggregate interest paid by the Government might have exceeded the amount it could collect from the insured.

In any event, the insured's obligation to the insurer was for the full amount of unpaid premiums and interest at the policy loan rate, as above pointed out, whereas although the Government fully discharged that obligation, the insured was actually called upon to pay such indebtedness, *less cash surrender value of his policy.* (Section 411 plainly provides that the cash surrender value of *each policy,* not to exceed defaulted premiums plus interest *on such policy,* was to be credited against the Government's liability on the guaranty.) But an insured not paying premiums during his period of service and two years thereafter did not contribute to the cash surrender value *which nevertheless accumulated during that period* (the Government received credit for the enhanced amount at settlement), hence, to the extent it was created or enlarged during such period, the insured lost none of his own money by its application to reduce the amount payable to the insurer on final settlement pursuant to the Act's provisions. As a matter of absolute fact he gained thereby. The point is that the insured is never charged, on final settlement, the full amount of the defaulted premiums with interest at the policy loan rate but only the difference between such sum and the cash surrender value—to

the latter of which, in most instances, he made little or no contribution whatever.

Clearly illustrating this point is the record maintained by VA covering the protected policy involved in the *Hendler* case, 123 F. Supp. 383 (but which was not before the court when the *Hendler* case was disposed of by motion). We have set out a brief extract of this record in Appendix F, *infra,* p. 101. The record shows that Hendler paid his insurer only ¼th of his first $213.25 annual premium (amounting to about $53 for the period January-March, 1942) before his policy was brought under the protection of the Act. By the time the protection ended, however, the cash surrender value (enhanced by virtue of the Government's guaranty) *had increased to $805.* That value, which was more than fifteen times his initial and only payment to the insurer, was credited toward his debt to the insurer on final settlement.

Third, while it is true that a guarantor's right of reimbursement is normally limited to his net outlay, there is no reason why, in the absence of any overreaching, the agreement between the parties cannot provide otherwise. The transaction of guaranty is one of contract and, like any contract, its terms determine the ultimate rights. Here, the terms and conditions of the 1940 Act (not the application *alone,* as appellants seem to urge) spelled out the conditions under which the Government would undertake to guarantee the defaulted premiums. From the very outset, all parties to the transaction were charged with knowledge of the accounting and settlement provisions of the Act, the possibility of a difference in the interest rates, and the possible "profit" to the Gov-

ernment. The insured as well as the insurer went forward, the insured presumably aware of the possible "profit," and the insurer knowing that if it pursued the guaranty it would recover interest at the rate of 3 percent instead of 5 or 6 percent. As to the insurer, it was obtaining a guaranty from one whose credit and whose terms of easy payment under the guaranty warranted a reduction in the interest rate. As to the insured, the situation is hardly different from the usual surety situation where the surety company charges a fee for its undertaking; indeed, the Government frequently charges a fee for its guaranty, perhaps the most common situation being the ½% charge in connection with private home mortgages guaranteed by the Federal Housing Administration. Congress may have contemplated that any difference in interest rates between that paid on certificates and that provided for policy loans should be retained by the Government against its contingent liabilities under the Act.

Fourth, if the normal rule against the guarantor making a "profit" cannot be altered by contract, there surely is no reason why it cannot be modified by statute, particularly since the statute does not increase the insured's original or primary obligation.

Fifth, a corollary to the normal rule is that the guarantor is entitled to be reimbursed for all expenses reasonably incurred by him in connection with his undertaking. *Restatement of Restitution,* Sec. 80 (b); 4 *Williston on Contracts (Rev. Ed.)*, p. 3666. The possible disparity referred to in *Hormel* may be said to reflect and to offset, at least in part, the Government's expenses in connection with the entire undertaking under Article IV of the Act. The experience under the

1918 Act where a deficiency appropriation was necessary (*supra,* fn. 38, p. 33), the anticipation that reimbursement collections would not be possible in all cases, the administrative expenses involved, all suggest that Congress may have intended to spread the burden of costs through the system adopted.

Finally, bearing in mind appellants' argument that the Government's only remedy is the "lien on the policy, nothing more" (App. Op. Br. p. 43), it becomes obvious that if appellants' argument and the *Hormel* reasoning were to prevail, that remedy, too, would have to be held to be a nullity. Thus, appellants, following *Hormel,* argue that the United States is limited in reimbursement to the precise amount it pays to the insurer on behalf of the insured; that, due to the "profit" factor and the method of settlement, such amount is not ascertainable; and that the failure of Congress to provide a plan to determine that amount, they say, shows that Congress never intended to require reimbursement in any amount. *But, by parity of reasoning, the Government would be similarly precluded from exercising the remedy of the lien. For, under appellants' argument, there would be no way of determining the amount due the United States in enforcing the lien.* There would be no method of determining how much of the cash surrender value, available to the United States through the lien, can be applied to liquidate the Government's claim against the insured; in fact, every argument appellants and the *Hormel* opinion make with reference to the impossibility of ascertaining the amount of the Government's claim would also apply in determining the amount of the lien. The lien is a charge on the policy to the

extent of that claim, and if the extent of the claim cannot be ascertained, neither can the extent of the lien. Thus, to adopt appellants' argument and the *Hormel* reasoning would nullify the statute's remedy of lien, and would leave the Government with no remedy at all, a manifest distortion of Congressional purpose. The short of it is that appellants' argument and the *Hormel* decision are erroneous.

V

The Government Had the Right to Offset Appellants' Indebtedness Against the Dividends

Appellants assert, as they did below, that even if the Government is entitled to reimbursement, it is prohibited by 38 U.S.C. 454a (*infra,* p. 96) from offsetting their indebtedness under the Civil Relief Act against their NSLI dividends. This argument has been so effectively disposed of by Judge Lemmon below (R. 119-123; 123 F. Supp. at 597-9) and by the *Administrator's Decision No. 742* (R. 89-84) that little need be added.

1. Unquestionably, the United States has the same right, "which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due him." *Gratiot* v. *United States,* 15 Pet. 336, 370; *United States* v. *Munsey Trust Co.,* 332 U.S. 234, 239; *McKnight* v. *United States,* 98 U.S. 179, 186. The rule may be overridden only when a statute unequivocally provides otherwise. Sec. 454a does exempt certain veterans' benefits from set-off, but there is an exception to that exemption.[68] That exception permitting the offset of "overpay-

[68] Sec. 454a bars "the collection by set-off or otherwise out of any benefits payable pursuant to any law administered by the Veterans' Administration and relating to veterans * * * of any claim of the

ments" made under laws relating to veterans, is applicable here. It has been the consistent administrative construction of this section that an "overpayment" includes anything of value which a veteran obtains under color of laws relating to veterans, that "if the Government pays a veteran's obligation pursuant to law and the veteran refuses to pay the debt therefrom arising, he is in a very real sense overpaid and there is an overpayment within the meaning of the exemption statute" (R. 122; *Administrator's Decision No. 742, supra; id., No. 607* (Nov. 24, 1944), Vol. 1, pp. 1097, 1101). The administrative construction is "not to be overturned unless clearly wrong" (*United States* v. *Citizens Loan & Trust Co.,* 316 U.S. 209, 214; *United States* v. *Jackson,* 280 U.S. 183, 193). Far from being wrong, the construction is both reasonable and equitable. Moreover, Sec. 406 of the 1942 Amendment (described in Congress as a *clarifying* measure) provides specifically for offset.

2. Appellants argue (Op. Br. p. 72-3) that insurance protection was not a "payment" to the insured, that they were entitled to it as a matter of right. But their application for protection was in effect a request that the Government guarantee payment of their premiums, and when the Government, pursuant to that guaranty, paid their defaulted premiums, such payment was made on their behalf and it discharged their obligation to the insurer. It is little short of ludicrous to argue that payment to another under such circumstances was not, to all intents and purposes, a payment to appellants. This was an overpayment even within the dictionary

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United States * * * against * * * any beneficiary * * * *except* amounts due the United States by such beneficiary * * * by reason of *overpayments* or illegal payments made under such laws relating to veterans, to such beneficiary * * * ." [Emphasis added.]

definition of the word relied on by appellants, for appellants were entitled (as a matter of right) to a moratorium, but not to have the Government itself gratuitously assume and discharge their obligations; to obtain a gratuitous discharge of their indebtedness to the insurer would be to obtain compensation or reward "beyond deserts" (see *id.*)

3. The history of Sec. 454a is reviewed in *Administrator's Decision No. 742, supra* (R. 89-94), and in *No. 607, supra.* There is no need to repeat it here. Examination of that history does not contradict, rather it forcefully fortifies, the decision below on the offset point.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

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MARCH 1955.

APPENDICES

APPENDIX A

The Soldiers' and Sailors' Civil Relief Act of 1918 provides in pertinent part as follows (40 Stat. 440, 444-447):

ARTICLE I

GENERAL PROVISIONS

SEC. 100. That for the purpose of enabling the United States the more successfully to prosecute and carry on the war in which it is at present engaged, protection is hereby extended to persons in military service of the United States in order to prevent prejudice or injury to their civil rights during their term of service and to enable them to devote their entire energy to the military needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the continuance of the present war.

* * * * *

ARTICLE IV

INSURANCE

SEC. 400. That in this Article the term "policy" shall include any contract of life insurance on the level premium or legal reserve plan. It shall also include any benefit in the nature of life insurance arising out of membership in any fraternal or beneficial association; the term "premium" shall include membership dues or assessments in such association, and the date of issuance of policy as herein limited shall refer to the date of admission

to membership in such association; the term "insured" shall include any person who is the holder of a policy as defined in this Article; the term "insurer" shall include any corporation, partnership, or other form of association which secures or provides insurance under any policy as defined in this Article.

SEC. 401. That the benefits of this Article shall apply to any person in military service who is the holder of a policy of life insurance, when such holder shall apply for such benefits on a form prepared in accordance with regulations which shall be prescribed by the Secretary of the Treasury. Such form shall set forth particularly that the application therein made is a consent to such modification of the terms of the original contract of insurance as are made necessary by the provisions of this Article and by receiving and filing the same the insurer shall be deemed to have assented thereto, to the extent, if any, to which the policy on which the application is made is within the provisions of this Article. The original of such application shall be sent by the insured to the insurer, and a copy thereof to the Bureau of War Risk Insurance.

The Bureau of War Risk Insurance shall issue through suitable military and naval channels a notice explaining the provisions of this Article and shall furnish forms to be distributed to those desiring to make application for its benefits.

SEC. 402. That the benefits of this Act shall be available to any person in military service in respect of contracts of insurance in force under their

terms up to but not exceeding a face value of $5,000, irrespective of the number of policies held by such person whether in one or more companies, when such contracts were made and a premium was paid thereon before September first, nineteen hundred and seventeen; but in no event shall the provisions of this Article apply to any policy on which premiums are due and unpaid for a period of more than one year at the time when application for the benefits of this Article is made or in respect of any policy on which there is outstanding a policy loan or other indebtedness equal to or greater than fifty percentum of the cash surrender value of the policy.

SEC. 403. That the Bureau of War Risk Insurance shall, subject to regulations, which shall be prescribed by the Secretary of the Treasury, compile and maintain a list of such persons in military service as have made application for the benefits of this Article, and shall (1) reject any applications for such benefits made by persons who are not persons in military service; (2) reject any applications for such benefits in excess of the amount permitted by section four hundred and two; and (3) reject any applications in respect of contracts of insurance otherwise not entitled to the benefits of this Article. Said bureau shall immediately notify the insurer and the insured in writing of every rejection or approval.

SEC. 404. That when one or more applications are made under this Article by any one person in military service in respect of insurance exceeding a total face value of $5,000, whether on one or more

policies or in one or more companies, and the insured shall not in his application indicate an order of preference, the Bureau of War Risk Insurance shall reject such policies as have the inferior cash surrender value, so as to reduce the total benefits conferred within the face value of $5,000, and where necessary for this purpose shall direct the insurer to divide any policy into two separate policies. The said bureau shall immediately notify the insurer and the insured in writing of such selection.

SEC. 405. That no policy which has not lapsed for the nonpayment of premium before the commencement of the period of military service of the insured, and which has been brought within the benefits of this Article, shall lapse or be forfeited for the nonpayment of premium during the period of such service or during one year after the expiration of such period: *Provided,* That in no case shall this prohibition extend for more than one year after the termination of the war.

SEC. 406. That within the first fifteen days of each calendar month after the date of approval of this Act until the expiration of one year after the termination of the war, every insurance corporation or association to which application has been made as herein provided, for the benefits of this Article, shall render to the Bureau of War Risk Insurance a report, duly verified, setting forth the following facts:

First. The names of the persons who have applied for such benefits, and the face value of the policies in respect of which such benefits have been

applied for by such persons, during the preceding calendar month;

Second. A list as far as practicable of the premiums in respect of policies entitled to the benefits of this Article which remain unpaid on the last day of the preceding calendar month, which day is at least thirty-one days after the due date of the premiums, provided such premiums have not previously been so reported as in default;

Third. A list of premiums which, having been previously reported as in default, have been paid by the policyholder or some one on his behalf in whole or in part during the preceding calendar month;

Fourth. A computation of the difference between the total amount of defaulted premiums therein reported and the total amount of premiums paid as therein reported, after having been previously reported as in default. From this sum shall be deducted the total sum of any premiums previously reported as in default, upon policies in respect of which the Bureau of War Risk Insurance has, since the date of such report, rejected an application for the benefits of this Article. The final sum so arrived at shall be denominated the monthly difference.

SEC. 407. That the Bureau of War Risk Insurance shall verify the computation of monthly difference reported by each insurer, and shall certify it, as corrected, to the Secretary of the Treasury and the insurer.

SEC. 408. That the Secretary of the Treasury shall, within ten days thereafter, deliver each

month to the proper officer of each insurer, bonds of the United States to the amount of that multiple of $100 nearest to the monthly difference certified in respect of each insurer. Such bonds shall be registered in the names of the respective insurers, who shall be entitled to receive the interest accruing thereon, and such bonds shall not be transferred, or again registered, except upon the approval of the Director of the Bureau of War Risk Insurance, and shall remain in the possession of the insurer until settlement is made in accordance with this Article: *Provided,* That whenever the fact of insolvency shall be ascertained by the Director of the Bureau of War Risk Insurance all obligation on the part of the United States, under this Article, for future premiums on policies of such insurer shall thereupon terminate. An insurer shall furnish semiannual statements to the Bureau of War Risk Insurance.

SEC. 409. That the bonds so delivered shall be held by the respective insurers as security for the payment of the defaulted premiums with interest. To indemnify it against loss the United States shall have a first lien upon any policy receiving the benefits of this Article, subject only to any lien existing at the time the policy became subject to this Act, and no loan or settlement or payment of dividend shall be made by the insurer on such policy which may prejudice the security of such lien. Before any dividend is paid or any loan or settlement is made the written consent of the Bureau of War Risk Insurance must be obtained.

SEC. 410. That in the event that the military

service of any person being the holder of a policy receiving the benefits of this Article shall be terminated by death, the amount of any unpaid premiums, with interest at the rate provided for in the policy for policy loans, shall be deducted from the proceeds of the policy and shall be included in the next monthly report of the insurer as premiums paid.

SEC. 411. That if the insured does not within one year after the termination of his period of military service pay to the insurer all past due premiums with interest thereon from their several due dates at the rate provided in the policy for policy loans, the policy shall at the end of such year immediately lapse and become void, and the insurer shall thereupon become liable to pay the cash surrender value thereof, if any: *Provided,* That if the insured is in the military service at the termination of the war such lapse shall occur and surrender value be payable at the expiration of one year after the termination of the war.

SEC. 412. That at the expiration of one year after the termination of the war there shall be an account stated between each insurer and the United States, in which the following items shall be credited to the insurer:

(1) The total amount of the monthly differences reported under this Article;

(2) The difference between the total interest received by the insurer upon the bonds held by it as security and the total interest upon such monthly differences at the rate of five per centum per annum; and in which there shall be credited

to the United States the amount of the cash surrender value of each policy lapsed or forfeited as provided in section four hundred and eleven, but not in any case a greater amount on any policy than the total of the unpaid premiums with interest thereon at the rate provided for in the policy for policy loans.

SEC. 413. That the balance in favor of the insurer shall, in each case, be paid to it by the United States upon the surrender by the insurer of the bonds delivered to it from time to time by the Secretary of the Treasury under the provisions of this Article.

SEC. 414. That this Article shall not apply to any policy which is void or which may at the option of the insurer be voidable, if the insured is in military service, either in this country or abroad, nor to any policy which as a result of being in military service, either in this country or abroad, provides for the payment of any sum less than the face thereof or for the payment of an additional amount as premium.

SEC. 415. That this Article shall apply only to insurance companies or associations which are required by the law under which they are organized or doing business to maintain a reserve, or, which if not so required, have made or shall make provision for the collection from all those insured in such insurer of a premium to cover the special war risk of those insured persons who are in military service.

APPENDIX B

The Soldiers' and Sailors' Civil Relief Act of 1940 provides in pertinent part as follows (54 Stat. 1178, 1179, 1183-1186; 50 U. S. C. App. (1940 Ed.) 510, 540-554):

ARTICLE I

GENERAL PROVISIONS

SEC. 100. In order to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is hereby made to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this Act remains in force.

* * * * *

ARTICLE IV

INSURANCE

SEC. 400. In this article the term "policy shall include any contract of life insurance on the level premium or legal reserve plan. It shall also include any benefit in the nature of life insurance

arising out of membership in any fraternal or beneficial association; the term "premium" shall include membership dues or assessments in such association, and the date of issuance of policy as herein limited shall refer to the date of admission to membership in such association; the term "insured" shall include any person who is the holder of a policy as defined in this article; the term "insurer" shall include any corporation, partnership, or other form of association which secures or provides insurance under any policy as defined in this article.

SEC. 401. (1) The benefits of this article shall apply to any person in military service who is the holder of a policy of life insurance, when such holder shall apply for such benefits on a form prepared in accordance with regulations which shall be prescribed by the Administrator of Veterans' Affairs. Such form shall set forth particularly that the application therein made is a consent to such modification of the terms of the original contract of insurance as are made necessary by the provisions of this article and by receiving and filing the same the insurer shall be deemed to have assented thereto, to the extent, if any, to which the policy on which the application is made is within the provisions of this article. The original of such application shall be sent by the insured to the insurer, and a copy thereof to the Veterans' Administration.

(2) The Veterans' Administration shall issue through suitable military and naval channels a notice for distribution by appropriate military and

naval authorities to persons in the military service explaining the provisions of this article and shall furnish forms to be distributed to those desiring to make application for its benefits.

SEC. 402. The benefits of this Act shall be available to any person in military service in respect of contracts of insurance in force under their terms up to but not exceeding a face value of $5,000, irrespective of the number of policies held by such person whether in one or more companies, when such contracts were made and a premium was paid thereon before the date of approval of this Act or not less than thirty days before entry into the military service; but in no event shall the provisions of this article apply to any policy on which premiums are due and unpaid for a period of more than one year at the time when application for the benefits of this article is made or in respect of any policy on which there is outstanding a policy loan or other indebtedness equal to or greater than 50 per centum of the cash surrender value of the policy.

SEC. 403. The Veterans' Administration shall, subject to regulations, which shall be prescribed by the Administrator of Veterans' Affairs, compile and maintain a list of such persons in military service as have made application for the benefits of this article, and shall (1) reject any application for such benefits made by persons who are not persons in military service; (2) reject any applications for such benefits in excess of the amount permitted by section 402; and (3) reject any applications in respect of contracts of insurance otherwise not entitled to the benefits of

this article. Said Administration shall immediately notify the insurer and the insured in writing of every rejection or approval.

SEC. 404. When one or more applications are made under this article by any one person in military service in respect of insurance exceeding a total face value of $5,000, whether on one or more policies or in one or more companies, and the insured shall not in his application indicate an order of preference, the Veterans' Administration shall reject such policies as have the inferior cash surrender value, so as to reduce the total benefits conferred within the face value of $5,000, and where necessary for this purpose shall direct the insurer to divide any policy into two separate policies. The said Administration shall immediately notify the insurer and the insured in writing of such selection.

SEC. 405. No policy which has not lapsed for the nonpayment of premium before the commencement of the period of military service of the insured, and which has been brought within the benefits of this article, shall lapse or be forfeited for the nonpayment of premium during the period of such service or during one year after the expiration of such period: *Provided,* That in no case shall this prohibition extend for more than one year after the date when this Act ceases to be in force.

SEC. 406. Within the first fifteen days of each calendar month after the date of approval of this Act until the expiration of one year after the date when this Act ceases to be in force every

insurance corporation or association to which application has been made as herein provided, for the benefits of this article, shall render to the Veterans' Administration a report, duly verified, setting forth the following facts:

First. The names of the persons who have applied for such benefits, and the face value of the policies in respect of which such benefits have been applied for by such persons, during the preceding calendar month.

Second. A list as far as practicable of the premiums in respect of policies entitled to the benefits of this article, which remain unpaid on the last day of the preceding calendar month, which day is at least thirty-one days after the due date of the premiums, provided such premiums have not previously been so reported as in default.

Third. A list of premiums which, having been previously reported as in default, have been paid by the policyholder or someone on his behalf in whole or in part during the preceding calendar month.

Fourth. A computation of the difference between the total amount of defaulted premiums therein reported and the total amount of premiums paid as therein reported, after having been previously reported as in default. From this sum shall be deducted the total sum of any premiums previously reported as in default, upon policies in respect of which the Veterans' Administration has, since the date of such report, rejected an application for the benefits of this article. The final sum so arrived at shall be denominated the monthly difference.

SEC. 407. The Administrator of Veterans' Affairs shall verify the computation of monthly difference reported by each insured and shall, within ten days thereafter, deliver each month to the proper officer of such insurer, a certificate in the amount of the monthly difference certified in respect of each insurer. Such certificate shall be signed by said Administrator in the name of the United States, shall be in such form as the Administrator shall determine, shall be payable to the insurer within sixty days after the approval of the statement of account, as provided in Section 411 hereof, and shall bear interest at a rate to be prescribed by the Secretary of the Treasury, payable with the principal. Such certificate shall not be transferred except with the approval of said Administrator and shall remain with the insurer until settlement is made in accordance with this article.

SEC. 408. The certificate so delivered shall be held by the respective insurers as security for the payment of the defaulted premiums with interest. To indemnify it against loss the United States shall have a first lien upon any policy receiving the benefits of this article, subject only to any lien existing at the time the policy became subject to this Act, and no loan or settlement or payment of dividend shall be made by the insurer on such policy which may prejudice the security of such lien. Before any dividend is paid or any loan or settlement is made the written consent of the Veterans' Administration must be obtained.

SEC. 409. In the event that the military serv-

ice of any person being the holder of a policy receiving the benefits of this article shall be terminated by death, the amount of any unpaid premiums, with interest at the rate provided for in the policy for policy loans, shall be deducted from the proceeds of the policy and shall be included in the next monthly report of the insurer as premiums paid.

SEC. 410. If the insured does not within one year after the termination of his period of military service pay to the insurer all past due premiums with interest thereon from their several due dates at the rate provided in the policy for policy loans, the policy shall at the end of such year immediately lapse and become void, and the insurer shall thereupon become liable to pay the cash surrender value thereof, if any: *Provided,* That if the insured is in the military service when this Act ceases to be in force, such lapse shall occur and surrender value be payable at the expiration of one year after the date when this Act ceases to be in force.

SEC. 411. At the expiration of one year after the date when this Act ceases to be in force there shall be an account stated between each insurer and the United States, in which there shall be credited to the insurer the total amount of the certificates held as security under this article, together with accrued interest to the date of the account, and in which there shall be credited to the United States the amount of the cash surrender value of each policy lapsed or forfeited as provided in Section 410, but not in any case a greater amount on

any policy than the total of the unpaid premiums with interest thereon at the rate provided for in the policy for policy loans.

SEC. 412. The balance in favor of the insurer in each case shall be certified by the Administrator of Veterans' Affairs to the Secretary of the Treasury, who shall pay to the insurer the amount thereof, which is hereby authorized to be appropriated, out of any moneys in the Treasury not otherwise appropriated, upon the surrender by the insurer of the certificates delivered to it from time to time by the Administrator of Veterans' Affairs under the provisions of this article.

SEC. 413. This article shall not apply to any policy which is void or which may at the option of the insured be voidable, if the insured is in military service, either in this country or abroad, nor to any policy which as a result of being in military service, either in this country or abroad, provides for the payment of any sum less than the face thereof or for the payment of an additional amount as premium.

SEC. 414. This article shall apply only to insurance companies or associations which are required by the law under which they are organized or doing business to maintain a reserve, or, which if not so required, have made or shall make provision for the collection from all those insured in such insurer of a premium to cover the special was risk of those insured persons who are in military service.

* * * * *

Article VI

Administrative Remedies

* * * * *

Sec. 604. This Act shall remain in force until May 15, 1945: *Provided,* That should the United States be then engaged in a war, this Act shall remain in force until such war is terminated by a treaty of peace proclaimed by the President and for six months thereafter: * * *

APPENDIX C

The 1942 Amendment of the Soldiers' and Sailors' Civil Relief Act of 1940 provides in pertinent part as follows (56 Stat. 769, 773-776; 50 U.S.C. App. 541-548):

Sec. 13. Article IV of such Act is amended to read as follows:

Article IV

INSURANCE

* * * * *

Sec. 401. The benefits and privileges of this article shall apply to any insured, when such insured or a person designated by him, or, in case the insured is outside the continental United States (excluding Alaska and the Panama Canal Zone), a beneficiary, shall make written application for protection under this article, unless the Administrator of Veterans' Affairs in passing upon such application as provided in this article

shall find that the policy is not entitled to protection hereunder. The Veterans' Administration shall give notice to the military and naval authorities of the provisions of this article, and shall include in such notice an explanation of such provisions for the information of those desiring to make application for the benefits thereof. The original of such application shall be sent by the insured to the insurer, and a copy thereof to the Veterans' Administration. The total amount of insurance on the life of one insured under policies protected by the provisions of this article shall not exceed $10,000. If an insured makes application for protection of policies on his life totaling insurance in excess of $10,000, the Administrator is authorized to have the amount of insurance divided into two or more policies so that the protection of this article may be extended to include policies for a total amount of insurance not to exceed $10,000, and a policy which affords the best security to the Government shall be given preference.

SEC. 402. Any writing signed by the insured and identifying the policy and the insurer, and agreeing that his rights under the policy are subject to and modified by the provisions of this article, shall be sufficient as an application for the benefits of this article, but the Veterans' Administration may require the insured and insurer to execute such other forms as may be deemed advisable. Upon receipt of the application of the insured the insurer shall furnish such report to the Veterans' Administration concerning the pol-

icy as shall be prescribed by regulations. The insured who has made application for protection under this article and the insurer shall be deemed to have agreed to such modification of the policy as may be required to give this article full force and effect with respect to such policy.

SEC. 403. The Administrator of Veterans' Affairs shall find whether the policy is entitled to protection under this article and shall notify the insured and the insurer of such finding. Any policy found by the Administrator of Veterans' Affairs to be entitled to protection under this article shall not, subsequent to date of application, and during the period of military service of the insured or during two years after the expiration of such service, lapse or otherwise terminate or be forfeited for the nonpayment of a premium becoming due and payable, or the nonpayment of any indebtedness or interest.

SEC. 404. No dividend or other monetary benefit under a policy shall be paid to an insured or used to purchase dividend additions while a policy is protected by the provisions of this article except with the consent and approval of the Veterans' Administration. If such consent is not procured, such dividends or benefits shall be added to the value of the policy to be used as a credit when final settlement is made with the insurer. No cash value, loan value, or withdrawal of dividend accumulation, or unearned premium, or other value of similar character shall be available to the insured while the policy is protected under this article except upon approval by the Veterans' Ad-

ministration. The insured's right to change a beneficiary designation or select an optional settlement for a beneficiary shall not be affected by the provisions of this article.

SEC. 405. In the event of maturity of a policy as a death claim or otherwise before the expiration of the period of protection under the provisions of this article, the insurer in making settlement will deduct from the amount of insurance the premiums guaranteed under this article, together with interest thereon at the rate fixed in the policy for policy loans. If no rate of interest is specifically fixed in the policy, the rate shall be the rate fixed for policy loans in other policies issued by the insurer at the time the policy brought under the Act was issued. The amount deducted by reason of the protection afforded by this article shall be reported by the insurer to the Administrator of Veterans' Affairs.

SEC. 406. Payment of premiums and interest thereon at the rate specified in section 405 hereof becoming due on a policy while protected under the provisions of this article is guaranteed by the United States, and if the amount so guaranteed is not paid to the insurer prior to the expiration of the period of insurance protection under this article, the amount then due shall be treated by the insurer as a policy loan on such policy, but if at the expiration of said period the cash surrender value is less than the amount then due, the policy shall then cease and terminate and the United States shall pay the insurer the difference between such amount and the cash surrender value. The

amount paid by the United States to an insurer on account of applications approved under the provisions of this article, as amended, shall become a debt due to the United States by the insured on whose account payment was made and, notwithstanding any other Act, such amount may be collected either by deduction from any amount due said insured by the United States or as otherwise authorized by law.

SEC. 407. The Administrator of Veterans' Affairs is hereby authorized and directed to provide by regulations for such rules of procedure and forms as he may deem advisable in carrying out the provisions of this article. The findings of fact and conclusions of law made by the Administrator of Veterans' Affairs in administering the provisions of this article shall be final, and shall not be subject to review by any other official or agency of the Government. The Administrator of Veterans' Affairs shall report annually to the Congress on the administration of this article.

SEC. 408. (1) The provisions of this article in force immediately prior to the enactment of the Soldiers' and Sailors' Civil Relief Act amendments of 1942 (hereinafter in this section called "such provisions") shall remain in full force and effect with respect to all valid applications for protection executed prior to the date of enactment of the Soldiers' and Sailors' Civil Relief Act amendments of 1942 and all policies to which such applications pertain shall continue to be entitled to the protection granted thereby.

(2) Any insurer under a policy accepted under

such provisions shall, subject to the approval of the Administrator of Veterans' Affairs and upon complete surrender by it to the United States, within ninety days after the date of enactment of the Soldiers' and Sailors' Civil Relief Act amendments of 1942, of all certificates issued in accordance with such provisions together with all right to payment thereunder, be entitled to the guarantee of unpaid premiums and interest thereon and the mode of settlement for such policies as provided by this article, as amended. The privileges and benefits granted by the foregoing sentence shall be in lieu of the method of settlement, and the requirement for accounts and reports prescribed by such provisions. In the event any such insurer fails to surrender within the said ninety days all such certificates and rights to payment, the accounts, reports, and settlements required to be made by such insurer under such provisions shall continue to be made as required and shall be governed by such provisions.

APPENDIX D

Other statutes relevent to this case are as follows:

1. 38 U.S.C. 11a-2 provides:

§11a-2. *Finality of Administrator's decisions on questions concerning claims for benefits or payments.*

Notwithstanding any other provisions of law, except as provided in sections 445 and 817 of this

title, the decisions of the Administrator of Veterans' Affairs on any question of law or fact concerning a claim for benefits or payments under any Act administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decisions.

2. 38 U.S.C. 445 provides in pertinent part as follows:

§445. *Actions on claims; jurisdiction; parties; procedure; limitation; witnesses; definitions.*

In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the Veterans' Administration and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the United States District Court for the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is conferred upon such courts to hear and determine all such controversies. * * *.

* * * * *

The term "claim", as used in this section, means any writing which alleges permanent and total disability at a time when the contract of insurance was in force, or which uses words showing an intention to claim insurance benefits, and the term "disagreement" means a denial of the claim by the Administrator of Veterans' Affairs or someone

acting in his name on an appeal to the Administrator. * * *.

3. 38 U.S.C. 454a provides:

§454a. *Assignability and exempt status of payments of benefits.*

Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. Such provisions shall not attach to claims of the United States arising under such laws nor shall the exemption herein contained as to taxation extend to any property purchased in part or wholly out of such payments.

From and after October 17, 1940, this section shall be construed to prohibit the collection by set-off or otherwise out of any benefits payable pursuant to any law administered by the Veterans' Administration and relating to veterans, their estates, or their dependents, of any claim of the United States or any agency thereof against (a) any person other than the indebted beneficiary of his estate; or (b) any beneficiary or his estate except amounts due the United States by such beneficiary or his estate by reason of overpayments or illegal payments made under such laws relating to veterans, to such beneficiary or his

estate or to his dependents as such: *Provided, however,* That if the benefits be insurance payable by reason of yearly renewable term or of United States Government life (converted) insurance issued by the United States, the exemption herein provided shall be inapplicable to indebtedness existing against the particular insurance contract upon the maturity of which the claim is based, whether such indebtedness be in the form of liens to secure unpaid premiums, or loans, or interest on such premiums or loans, or indebtedness arising from overpayments of dividends, refunds, loans, or other insurance benefits: *Provided further,* That nothing in this amendatory Act shall be construed to modify or repeal section 687b of this title.

4. 38 U.S.C. 817 provides:

§817. *Suits in event of disagreement as to claims.*

In the event of disagreement as to any claim arising under this subchapter, suit may be brought in the same manner and subject to the same conditions and limitations as are applicable to the United States Government life (converted) insurance under the provisions of sections 445 and 551 of this title.

APPENDIX E

The following is an extract from the Congressional Record (86 Cong. Rec. pp. 13132-13133) concerning the bill which became the Soldiers' and Sailors' Relief Act of 1940. The bill (H. R. 10338) having been read

to the House, this discussion took place (emphasis added):

> Mr. VOORHIS of California:
>
> Mr. Speaker, * * * it seems to me that this bill ought to be as thoroughly understood as possible.
>
> I do not propose to make an oration here, but I do propose to try to interpret the bill as I understand it, with the request that I be corrected as I go along.
>
> I am afraid there are many Members of the House and there may be men who are going to be affected by the terms of this bill who are not going to understand what we are doing.
>
> As I understand what this bill provides, it is roughly the following: It says that if a person who is drafted into the service of the country under the terms of legislation recently passed, is renting a home or purchasing a home or has some other contract on which he is liable to make payments, then he shall not be dispossessed or his family shall not be evicted or no action of that sort shall be taken without court permission during the time he is in the service or for 3 months thereafter. *I do not understand, however, that his payments are in any way forgiven to him, or anything like that. He is still liable to make the same payments at some future time as he would have to make under these circumstances.* The only thing that happens is that his family cannot be evicted or the property cannot be taken away from him, which he is in the process of purchasing.

In the case of insurance I understand that the Government guarantees the difference between the amount of premium that the man can pay and the full amount of the premium but that the man must repay the Government for the amount that the Government pays on his behalf during this period, at some future time. * * * If I am wrong about any of these remarks, I want to be corrected now. I am only a layman. I am not a lawyer and I have not been on the committee, but I just made these remarks because I think it is a very important bill to many thousands of people and that Members of Congress ought to consider it carefully and that we ought to be clear in our minds as to what we are doing.

Mr. VAN ZANDT. Mr. Speaker, will the gentleman yield?

Mr. VOORHIS of California. I yield.

Mr. VAN ZANDT. Did I understand the gentleman to say that where a person has an insurance policy and is unable to meet the payments, the Government will assume that responsibility?

Mr. VOORHIS of California. Perhaps the chairman of the committee had better answer it, but my understanding is that the Government pays the difference betwen the amount a man is considered able to pay and the full amount of the premium, while he is in the service.

Mr. ARENDS. Will the gentleman yield?

Mr. VOORHIS of California. I yield.

Mr. ARENDS. The gentleman is correct. However, he will be issued a certificate and *he will have to pay this back.* In other words, the Gov-

ernment wil have a lien against this man's insurance policy *until such time as the owner of the insurance policy reimburses the Government.*

Mr. VOORHIS of California. And how long does he have to pay it back? A year?

Mr. ARENDS. A year after he is out of service.

Mr. VOORHIS of California. *And during that year he must repay the Government what it has paid on his policy?*

Mr. ARENDS. *That is correct.*

APPENDIX F

Extract of VA records re Hendler's protected policy:

STATEMENT OF ACCOUNT
SOLDIERS AND SAILORS CIVIL
RELIEF ACT OF 1940

PART I

1. Policy No. 1,607,069 Face Amount—$5,000 * * *
2. Insurer—The Maccabees * * * * *
3. Insured—Irwin P. Hendler * * * * *
4. Effective date—1/16/42 5. * * * * *
6. Plan—Retirement Income @ 55 Participating—Yes * * *
7. Policy loan rate of interest—4.8% In advance?—Yes * * *
8. Amount of annual premium—$213.25
9. Due date of first premium—3/1/42 10. Date policy terminated—10/6/47

PART II

Debits		Credits		
Due Date of Annual Premiums	Amount of Annual Premiums	Cash Payments	Dividends Credited	Date of Credits
3/1/42	$213.25	—	—	—
3/1/43	213.25	—	$16.80	1/1/44
3/1/44	213.25	—	17.30	1/1/45
3/1/45	213.25	—	17.85	1/1/46
3/1/46	213.25	—	18.40	1/1/47
3/1/47	128.53	(220 days)	—	—
Total Debits	$1194.78	Total Credits	$70.35	
Interest	206.20	Interest	.58	
Total Debits with interest	$1400.98	Total Credits with interest	$70.93	

Total Debits with Interest		$1400.98
Total Credits with Interest	$70.93	
Policy Value from Part III	805.00	875.93
Amount Due U. S.		$525.05

I hereby certify that the foregoing account is true

/s/ Edith O. Maske
Civil Relief Section

PART III

11. Policy values as of Date Policy Terminated:

(a) Cash surrender value	$805.00
(b) Dividend credits other than listed in Part II	None
(c) Cash value of all paid-up additions	None
Total	$805.00

* * * * *

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